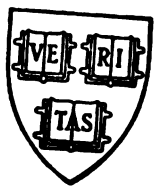

AN ANALYSIS

OF

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AN ANALYSIS

OF

AUSTIN'S LECTURES ON JURISPRUDENCE

OR THE

PHILOSOPHY OF POSITIVE LAW

By GORDON CAMPBELL

OF THE INNER TEMPLE

LONDON
JOHN MURRAY, ALBEMARLE STREET
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PREFACE.

THE writer cannot allow this work to appear before the public, without expressing his indebtedness to Mr. John Murray for his kindness and courtesy in sanctioning (on behalf of the representatives of the late Mr. Austin) the production of this Analysis.

The Fourth Edition of the Lectures has been used throughout, and extensive reference has been made to the excellent Student's Edition of Mr. Robert Campbell.

EXETER COLLEGE, OXFORD:
March, 1877.

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* The lectures break off while developing this sub-department. The remainder of the outline was never filled up.

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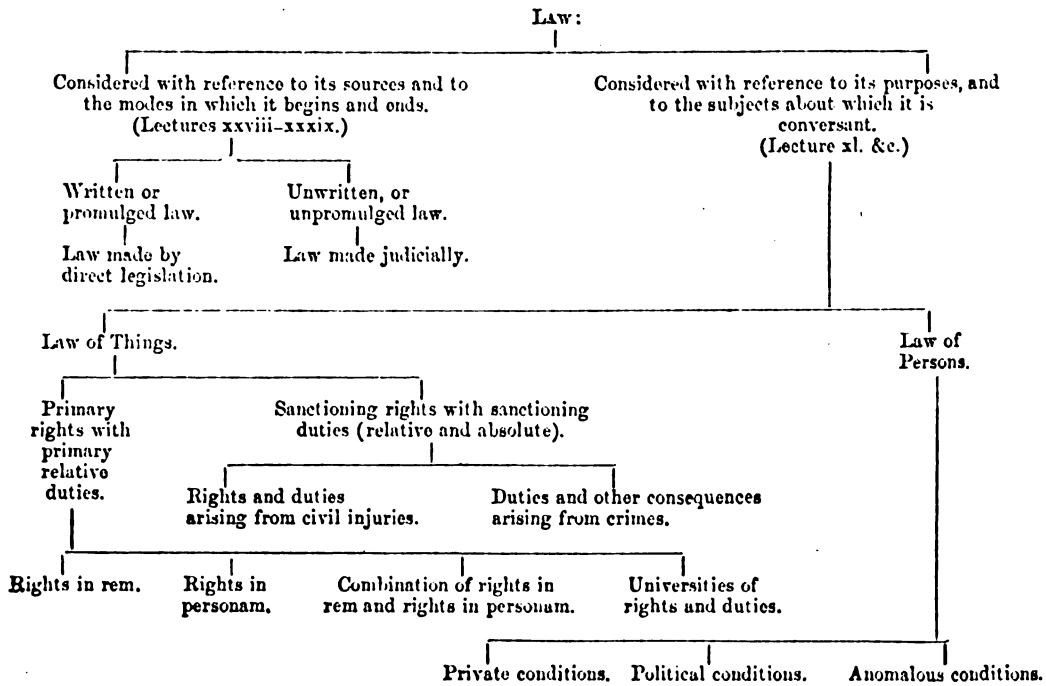


ANALYSIS

OF

AUSTIN'S JURISPRUDENCE.

PART I.—DEFINITIONS.

SECTION I.—THE PROVINCE OF JURISPRUDENCE DETERMINED

Introduction.

THE matter of Jurisprudence is Positive Law; law strictly so called, law set by political superiors to political inferiors.

To determine the province of Jurisprudence it will be necessary to distinguish positive law from various objects related to it by resemblance or analogy.

Laws in the literal or proper sense are rules laid down for an intelligent being by an intelligent being having authority over him, and in this sense the term Law comprises:—

A. Laws set by God to men, and
B. Laws set by men to men.

A. To this class of laws, or a portion of it, the term **Natural Law** has been applied; but as this phrase is ambiguous and misleading, it is better to reject it alto-

gether and designate these laws, considered collectively, as the Law of God.

B. Laws set by men to men, or Human Law.

Of these: 1. Some are established by political superiors acting as such. These receive the name of **Positive Law**, and are the proper subject matter of jurisprudence.

2. Some are set by men not political superiors, or not acting as such.

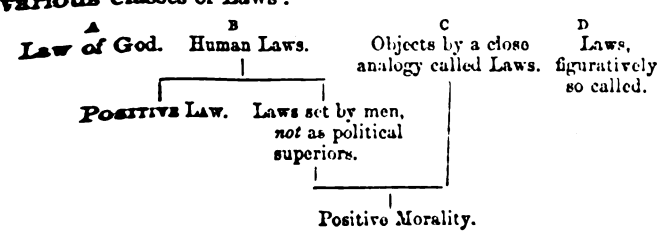
[Closely analogous to this second class are a set of objects improperly termed Laws, being rules set and enforced merely by the opinion of an indeterminate body of men, *e.g.* 'the law of honour.' 'the laws of fashion.' Rules of this species constitute much of what is called International Law.]

To these human laws of the second class (*i.e.* those set by men not political superiors, or not acting as such), together with the set of objects by close analogy called 'law,' is applied the general term of '**Positive Morality.**' The word '*morality*' severs them from Positive Law, and the word '*positive*' marks their distinction from Morality conceived of as conforming to the Laws of God.

Objects metaphorically termed laws.

Besides the above-mentioned classes there are objects to which the term Law can only rightly be applied in a metaphorical sense, such as '*the laws of gravitation*,' '*the laws of disease*.'

The following Table shows the relations between the various classes of Laws:—



Laws may therefore be divided into the four following classes:—

1. The Laws of God.
2. POSITIVE LAWS, simply and properly so called.
3. Positive Morality.
4. Laws metaphorically or figuratively so called.

Positive Laws are therefore related—

1. By way of resemblance to the laws of God.
2. By way of resemblance to that portion of Positive Morality which consists of Laws properly so called.
3. By way of strong analogy to that portion of Positive Morality which consists of Laws set by opinion.
4. By way of slender analogy to Laws figuratively so called.

The purpose of the first part of the work is to determine the province of jurisprudence, or to distinguish Positive Law from the objects to which it is in various ways related.

The method by which this purpose will be effected is as follows:—

1. To determine the essentials of a Law properly so called.
2. To determine the respective characters of the four classes into which Laws (proper and otherwise) may be divided, distinguishing each class from the others.

It will be convenient to treat these classes in the following order:—

A.—The Laws of God.
B.—Positive Morality.
C.—Laws figuratively so called.
D.—POSITIVE LAW.

LECTURE I.

The Essentials of a Law properly so called.

LAWS PROPER ARE A SPECIES OF COMMAND.—A command is an expression of desire enforced by a sanction. Whenever a **command** is signified, a **duty** is imposed. The **sanction** is the evil that will probably be incurred if the command be disobeyed. Some **sanctions** are termed **punishments.**

[**Paley's view** lays too much stress upon the **violence** of the motive to compliance. Where there is the smallest chance of incurring the smallest evil the expression of a **wish** amounts to a **command** and imposes a **duty.**]

[**Locke and Bentham,** by straining the use of the word, apply the term 'sanction' to conditional good as well as conditional evil, to **reward as well as punishment.**]

The ideas then comprehended by the term '*command*' are—

1. A **wish** or **desire** conceived by one rational being, that another rational being shall do or forbear.
2. **An evil** to proceed from the former and to be incurred by the latter in case of non-compliance with the wish.
3. **An expression of the wish** by words or other **signs.**

Command, duty, and **sanction** are thus seen to be inseparably connected terms: if we speak directly of the **expression of the wish** we employ the term **command.** If of the **liability or obnoxiousness to evil, duty** or **obligation.**

If of the **evil itself,** the term **sanction.**

Each of these three terms, **command, obligation,** and **sanction,** signifies the same notion, but each **denotes** a different part of that notion and **connotes** the residue.

Commands are of two classes—

1. **General,** obliging to acts or forbearances of a class. To this class the term Law is applied.

2. **Particular,** obliging to acts or forbearances determined specifically.

[This distinction, however, does not accurately square with established forms of speech; for instance, a particular command issued in the form of an Act of Parliament would probably be called a Law on account of its form. It is therefore hard to draw a distinct line between Law and occasional commands.]

[**Blackstone's** distinction is as follows:—

1. **A law** obliges generally **members** of a given class.
2. **A particular command** obliges persons individually.

But Blackstone's definition of **Law** would include objects which are not Law—*e.g.* a command by the Sovereign that all corn actually shipped for exportation be stopped and detained.

So also his definition of Particular Command would include objects properly called Laws or Rules.]

Commands (including Laws) are said to proceed from **superiors** and to bind **inferiors**; the superiority implied in the term Command is the power of enforcing compliance with a wish by inflicting an evil in case of non-compliance.

Besides Laws properly so called, the subject matter of Jurisprudence properly includes objects improperly termed Laws (inasmuch as they are not commands): these are—

1. **Laws explaining Positive Law.**
2. **Laws repealing Laws.**
3. **Imperfect Laws,** or Laws of imperfect obligation (in the sense used by the Roman Jurists).

There are also certain Laws (properly so called) which may not seem to be commands, but which are really

imperative, and as such form part of the subject matter of Jurisprudence. These are—

1. Laws which apparently create rights merely. But every law really conferring a right expressly or tacitly imposes a relative duty.

2. **Customary Laws**—

According to the German view, they *exist as Positive Law* by the spontaneous adoption of the governed, and not by position or establishment on the part of political superiors.

According to another view, customary or judge made Law is purely the creature of the judges by whom it is immediately established.

The answer to both these arguments is that the rules of so-called Customary Law exist as Positive Morality by their spontaneous adoption by the governed, but as positive law when they are adopted as such by the courts of justice, or promulged in the statutes of the State.

LECTURE II.

THE CHARACTERS OF THE FOUR DIFFERENT CLASSES OF LAWS.

A. THE LAWS OF GOD.

A. THE LAWS OF GOD are laws or rules properly so called, they impose religious duties, are protected by religious sanctions, and their violations are termed sins.

Of the Divine Laws some are revealed, some unrevealed; the latter generally receiving the name of 'natural law' or 'law of nature.'

The revealed laws of God are express commands.

The question arises, how shall we know the unrevealed Laws of God? What is the index to them?

There are two principal theories which attempt to resolve this question.

1. THE HYPOTHESIS OR THEORY OF A MORAL SENSE.

Briefly stated, it is this. Some actions all mankind approve, others all men disapprove, and these sentiments arise naturally, spontaneously and generally.

These sentiments being universal are held to be signs of Divine approval or disapproval, and from these signs the rectitude or pravity of actions is inferred.

These sentiments have been referred to a faculty called the 'moral sense': the expression 'common sense' has also been adopted to express this hypothesis in question.

2. THE THEORY OF UTILITY.

Briefly stated.

God designs the happiness of all sentient creatures; some human actions forward that purpose, their TENDENCIES are beneficent or useful. Other human actions are adverse to that purpose, their TENDENCIES being mischievous and pernicious. The former class God has enjoined as promoting His purpose; the latter as being adverse to it, He has forbidden. If we know the tendencies of our actions, we know which He orders and which He forbids.

By *tendency* of an action we are to understand the *whole of its tendency*, *i.e.* the sum of its probable consequences, remote and collateral as well as direct, in so far as they may influence the general happiness.

In collecting this tendency we must look at the class of actions to which the particular action belongs.

Example.—A mischievous act, such as a small theft of bread by a starving man, may appear harmless. But if thefts were general the evils would be incalculable.

If, then, the tendencies of classes of actions be the

index to the will of God, it follows that most of his commands are general or universal, enjoining or prohibiting classes of acts.

It does not follow from the theory of utility that *every* useful action is the object of a Divine injunction, and every pernicious action the result of a Divine prohibition, for there are natural motives which impel us to some useful acts, and hold us in forbearance in regard to others, without any necessity for the intervention of the Lawgiver. Assuming the theory above stated, we are in a position to consider a current and specious objection to the theory of Utility.

The Objection stated.

Pleasure and pain (or good and evil) are inseparably connected, and follow every act and forbearance; if we shape our conduct to the principle of utility we should by deliberating on the good or evil resulting from the contemplated action, either lengthen our deliberations beyond due limits, which would be equivalent to forbearance or omission of the contemplated act, or we should decide hastily and, therefore, incorrectly. And thus, by seeking to adjust our conduct to the principle of utility, we should work mischief—in other words, the objection is 'that utility is a dangerous principle of conduct.'

The following is the first answer to the objection.

If utility be our only index to the tacit commands of the Deity, we must make the best we can of it. In the absence of a moral sense, which would teach man the duties imposed on him by the Deity, we must learn our duties from the tendencies of actions, or remain at our peril in ignorance of those duties.

The second answer is this:—

It is assumed by the objectors that every act will be preceded by a calculation of its consequences; if so, the principle of utility would be a dangerous guide. Our conduct would conform to rules inferred from the tendencies

of actions, and not by a direct resort to the principle of utility. The rules would be fashioned on utility, our conduct on our rules. The whole tendency of an act can only be measured by supposing that acts of the kind are largely practised. According as these classes of acts are conducive to the general happiness or otherwise, so it must be inferred that they are respectively enjoined or forbidden by the Deity by general **rules**. To these rules, chiefly existing in the form of maxims, our conduct would conform if adjusted to utility.

Inséparably connected with these rules are **moral sentiments**. A sentiment of approbation or disapprobation is intimately associated with the thought of acts enjoined or forbidden by the Deity; and it is by these sentiments **immediately**, and by calculation remotely, that human conduct is adjusted to utility.

In anomalous and excepted cases (of comparatively rare occurrence) our conduct would be fashioned **directly** on the principle of general utility, or guided by a conjecture and comparison of **specific** or **particular** consequences.

> For example, it is a general inference from the principle of utility, that God commands obedience to established government. The members of a political society who consider if resistance will probably attain the substitution of a good government for a bad one, must dismiss the rule and calculate specific consequences.

Even in anomalous cases utility furnishes an intelligible test and a likelihood of a just solution. These anomalous cases are few; in great majority of cases general happiness requires that **rules** shall be observed and **sentiments** associated with **rules** promptly obeyed.

LECTURE III.

A second objection to the theory of Utility stated. If the Divine Laws must be gathered from the tendencies of action, how can the rules ACTUALLY OBTAINING AMONG MANKIND accord completely and correctly with the Laws established by the Deity?

For (1) human actions are infinitely various, and their effects infinitely diversified, so that the task of collecting their tendencies is beyond human power.

And (2) if utility be the proximate test of positive Law and Morality, the defects of popular or vulgar ethics will hardly admit of a remedy; for if ethical truth be matter of science, the ethical maxims which govern the sentiments of the majority must be taken without examination from human authority.

The answer to this second objection to the theory of Utility.

Firstly. The diffusion of ethical science among the great bulk of mankind will gradually remove the obstacles which retard its advancement.

Secondly. Though the many must trust to authority for a number of subordinate truths, they are competent to examine the elements which are the ground-work of ethics, and to infer the more momentous of the derivative practical consequences.

Thirdly. By the advance of the science of ethics, and by the gradual removal of obscurity and uncertainties, those who cannot examine the science extensively for themselves will find a valid authority in the general agreement of impartial inquirers.

LECTURE IV.

Further, admitting the **imperfection of Utility as the index to the Divine pleasure, yet there is no necessary inference that Utility is not the index.**

[Law and Morality fashioned by man must necessarily be defective and erroneous, and the most perfect system of Ethics which the wit of man could conceive must be a partial and inaccurate copy of the Divine original.]

For the whole objection is based on the alleged inconsistency of evil with the perfect wisdom and goodness of good. But owing to causes beyond human knowledge, all the works of God which are open to our observation are alloyed with imperfection.

Laws or commands, like medicines, suppose the *existence of evils which they are designed to remedy.* Analogy (as Butler has shown) would lead us to expect the imperfection on which the objection is founded. Something of the imperfection which runs through the frame of the universe would probably be found in a revelation emanating from the Author of the universe.

The Hypothesis of a Moral Sense.

If we reject Utility as the index to God's commands we must assent to the theory which supposes a moral sense.

The hypothesis of a moral sense, which is variously signified by the various but equivalent expressions, such as '*the common sense of mankind*,' '*a moral instinct*,' '*the innate practical principles*,' involves two assumptions :—

1. **That we are gifted with moral sentiments which are ultimate or inscrutable facts.**

2. **That these sentiments are signs of the Divine will, approving or disapproving the actions which excite them.**

The first of these two assumptions implies **positively** that the conceptions entertained by human beings of certain human actions are generally accompanied by certain sentiments of approbation or disapprobation, and **negatively**, that these sentiments are **not** the result of reflection on the tendencies of actions, *nor* of education, *nor* of any antecedents within the reach of our inspection. In other words, the sentiments in question are said to be instinctive, or '*moral instincts.*'

The **second assumption** implies that the inscrutable feelings styled the *moral sense* arise directly with the thoughts of their appropriate objects, so that the *understanding* is never at fault though the *will* may be frail. Here arises the question, if we were really gifted with spontaneous sentiments of this sort, would it be possible seriously to question the fact of their existence.

There are two current arguments in favour of the hypothesis of a moral sense :—

(1.) That the judgments which we pass internally upon the rectitude or pravity of actions are immediate and involuntary.

The answer is—

1. The judgments which we do pass upon actions are generally hesitating and slow ;

2. Granting that they were invariably direct and inevitable, this will not prove that they are instinctive. Sentiments begotten in the way of association are not less prompt and involuntary than feelings which are instinctive and inscrutable ;

and—

3. Our moral sentiments would be prompt and inevitable, although they arose from a perception of Utility or by reference to human authority; not at first, perhaps, but in time the sentiment would be imme-

diately excited by the thought of the corresponding action.

The second current argument in favour of the hypothesis of a moral sense is—

(2). That the moral sentiments of all men are precisely alike.

It is argued thus: '*Opinions which result from observation and induction are not held by all mankind. But judgments as to the gravity or rectitude of actions are precisely alike with all men.*

'*Therefore our moral sentiments are instinctive.*'

The answer is—

Assuming that the moral sentiments of all men were precisely alike, this does not prove that they are *instinctive*.

The fact seems to be that with regard to actions of a *few* classes of actions the moral sentiments of *most* (though not *all*) men have been alike, with regard to others these sentiments have differed with great variety of degree.

The Intermediate and Compound Hypothesis.

According to an intermediate hypothesis compounded of the theory of Utility and the hypothesis of a Moral Sense, the moral sense is our guide to SOME of the Divine commands, but the principle of Utility to OTHERS.

It is supported by the facts that,—

(α) With regard to actions of a few classes the moral sentiments of most men have been alike.

With regard to those classes of actions there is some show of reason for the supposition of a moral sense.

(β) With regard to actions of other classes the moral sentiments of men have differed with every shade of disagreement.

In respect to these classes the supposition of a moral sense seems to be excluded.

Objection—

With regard to no single class of actions could it be shown that the opinions of *all* men have agreed.

And it is also clear that every objection against the simple pure hypothesis may be urged with slight adaptations against the mixed.

Practical importance of the above discussion.

By modern jurists Law is divided into

Law natural and Law positive;

which division exactly accords with that of the Roman jurists into '*Jus Gentium*' and '*Jus Civile.*'

Crimes follow a like division—by modern jurists into '*mala in se*' and '*mala quia prohibita,*' according to the classical writers into crimes '*juris gentium*' and '*jure civili.*'

On the assumption either of the theory of utility or that of a moral sense, the above distinctions are senseless; but if the *mixed hypothesis be true,* human positive rules fall into two natural divisions.

1. Positive rules which obtain with all men: to which the moral sense is the guide.

2. Positive rules which do not obtain universally: to which therefore the principle of utility must be the guide, in default of that of the moral sense.

Refutation of two current misconceptions of the theory of Utility.

The first error consists in confusing the MOTIVES which ought to determine our conduct with the PROXIMATE MEASURE OR TEST to which our conduct should conform.

For utility is not the source or spring of our highest obligations, but the guide to the source of those obligations. It is the index to the measure or test to which

our conduct should conform, the Divine commands being the ultimate test.

So, though the general good as determined by the principle of utility is the proximate measure or test, it is not necessarily the **motive** or inducement which determines our conduct.

The principle of utility does not demand that we shall always intend the general good, but that we shall never pursue our own peculiar good in a way inconsistent with that paramount object.

The foregoing misconception is due partly to the confusion caused by the use of the terms '*good and bad motives*;' for, properly speaking, no motive is either good or bad, and every motive may lead to good or bad actions, though some (as, for example, benevolence and religion) are pre-eminently likely to lead to good, and others to bad.

The total result is that—

1. **General utility** considered as the **measure or test** differs from general utility considered as a **motive or inducement.**

2. Our conduct, if truly adjusted to the principle of **utility**, would conform to **rules fashioned on that principle**, or be fashioned on sentiments founded on those rules.

But even then general utility would not, in most cases, be our **motive** or **inducement** to action or forbearance.

The second misconception stated.

The second error consists in confounding the theory of general utility with that theory or hypothesis concerning the origin of benevolence called the selfish system.

The error is twofold. 1. *In mistaking and distorting* the hypothesis concerning the origin of benevolence,

called the *selfish system*, and, 2, *in assuming* that this is a *necessary ingredient* in the *theory of utility*.

According to the first view, the existence of benevolence and sympathy is directly traceable to a self-regarding or selfish motive, and according to the second, assuming that general utility is the proximate test of conduct, it is supposed that all the motives which determine our conduct are self-regarding.

This theory of motives seems inadequate; for mere regard for self would hardly perform the office of general benevolence. And further, without benevolence of sympathy as an inducement, the motives impelling us to promote the general good would be more defective than they are. In any case it is clear that benevolence is one of the motives which determine our actions, though it is the principle of utility which is the measure or test of conduct.

LECTURE V.

We now resume the consideration of the four classes into which laws proper or otherwise may be divided, distinguishing each class from the others.

It will be remembered (see p. 3) that the various classes were to be treated in the following order:

A. The Laws of God.
B. Positive Morality.
C. Laws figuratively so called.
D. Positive Laws, the appropriate subject matter of Jurisprudence.

The law of God has been treated of in the last three lectures: we now come to the second division, Positive

Morality. We proceed to examine the distinguishing marks of (1) those moral rules which are **laws properly so called.**

(2.) Of those positive moral rules which are called laws by an **analogical** extension of the term, and (3) of the laws which are so styled by **metaphor,** but before doing so, we must explain certain terms which constantly occur.

The term **Law** is applied to—

1. **Laws, properly so called,** *i.e.* to objects which have all the essentials of an imperative law or rule, and are said to **resemble.**

2. **Laws, improperly so called,** *i.e.* to objects which are wanting in some of the essentials, but to which the term is extended either by—

(α) **Analogy,** or by
(β) **Metaphor.**

Explanation of the terms **Resemblance, Analogy,** and **Metaphor.**

Resemblance in the wider sense includes every degree of likeness between objects. In the language of Logic, objects which have **all the qualities composing the essence of the class Resemble.**

Analogy, in the original and proper sense of the word, expresses the relation between two objects **when one has some and the other all the properties of a class referred to**: but in common parlance it marks the resemblance between natural objects which do not belong to the same species (or narrow division), but which do belong to the same *genus* (or larger division).

Metaphor is the **transference,** on the grounds of analogy, real or supposed, **of a term from its primitive signification** to objects to which it is applied in a secondary sense.

We now see that we can clearly distinguish Laws (improperly so called) into those so styled by **Analogy** and those so styled by **Metaphor**.

Laws proper (with such improper laws as are closely analogous to the proper) can be distributed under three heads:—

Laws properly so called.

1. **The Laws of God.**
2. **Positive Laws.**
3. (α) **Laws set by men to men, but not in pursuance of legal rights nor as political superiors.**

Laws improperly so called by Analogy.

(β) **Laws which are merely opinions held by men with regard to human conduct.**

Positive Morality.

It thus appears that there are two classes of human **Laws**:—

Law. 1. **Laws (properly so called) set by men as political superiors, or in pursuance of legal rights.**

Morality. 2. **Laws (properly so called) set by men to men, but not in pursuance of legal rights nor as political superiors**; and

Laws (improperly so called) which are merely opinions held by men.

To the first of these classes the name **Law** is applied, to the second **Morality**. To distinguish both from the Law of God we apply the term **Positive**, meaning that these Laws exist by human position.

The science of Jurisprudence is concerned with positive Laws—Laws as they are.

[There is no science that treats positive Morality in the same way as jurisprudence treats positive Law.

The science of Ethics, or Deontology, affects to expound Law and **Morals** as they ought to be.]

B. Positive Morality.

We now proceed to analyse **Positive Morality.**

From the previous definition of a law it follows that every Law, properly so called, has a determinate author. **Laws of God** have been shown to be Laws properly so called.

Positive Laws (or laws strictly so called) are either set by supreme political superiors, by subordinate political superiors, or by subjects in pursuance of legal rights. They therefore flow from a determinate source, and are laws properly so called.

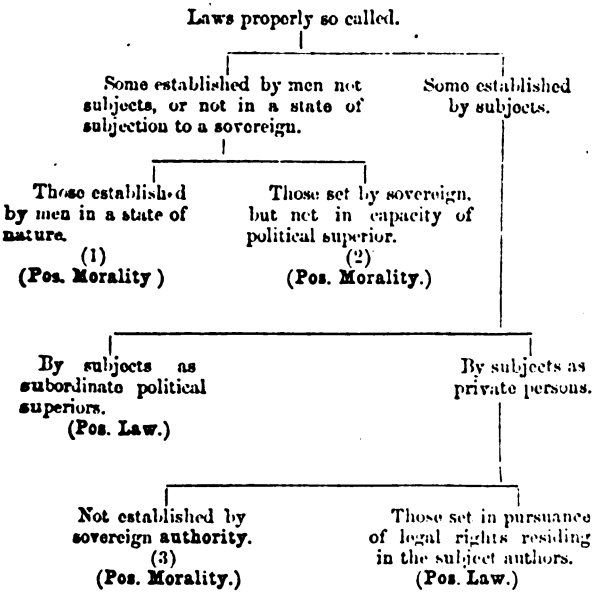
Positive Moral rules which are laws properly so called, inasmuch as they are not set by men as *political* superiors, nor by private persons in pursuance of legal rights, and thus are not commands, direct or otherwise, of the sovereign, are not *positive* laws, though being imperative and proceeding from determinate individuals, they are laws properly so called.

It will appear from the above distinctions and the following tabular statement, that positive moral rules which are laws properly so called are of three kinds:—

1. **Those which are set by men living in a state of nature.**

2. **Those set by sovereigns, but not by sovereigns as political superiors.**

3. **Those set by subjects as private persons, not in pursuance of legal rights.**



Positive moral rules, which are laws improperly so called, are laws set or imposed by public opinion: they are set by an indeterminate body or uncertain aggregate of persons, who do not command, either expressly or tacitly.

Grounds of Analogy between Law and Morality.

Positive moral rules, which are laws improperly so called, are closely analogous to laws properly so called; for—

1. There is in each case a body which wishes that conduct of a certain kind shall be forborne or pursued: in the case of a Law this is a determinate—in the case of a moral rule—an indeterminate body.

2. The obnoxiousness to evil on the part of the person obliged is the same in both cases.

3. The effect on the person obliged is similar in both cases.

4. The conduct of the person obliged has a similar tendency to uniformity in both cases.

The distinction between determinate and indeterminate bodies of persons as authors of Laws.

Determinate bodies are of two kinds—

1. Either they consist of persons determined specifically, *e.g.* of the persons A, B, C, &c., each determined by his specific description.

2. Or of persons determined generically, *i.e.* of persons belonging to the determinate body, by reason of their answering to a given generic description.

Examples.—The trading firm of A, B, and C is an instance of the first class. The British Parliament—consisting of the Queen or King, or whoever may fill that position, Peers and representatives of the Commons, who are entitled to sit and vote by reason of answering to those generic designations—is an example of the second class.

In indeterminate bodies, *all* the persons who compose it are not determined and assignable. Not *every* person is capable of being indicated. An indeterminate body consists of some of the persons who belong to another and larger aggregate, but of *how many* of those persons, and *which* in particular, is not and cannot be known completely.

An indeterminate body may either consist of an uncertain portion of a certain body or class, or an uncertain portion of an uncertain body or class.

For example.—A law set by the general opinion of a club is one held by an uncertain portion of a certain or determinate body.

A law set by the general opinion of gentlemen is one set by an indeterminate portion of an uncertain or indeterminate body.

A determinate body of persons is capable of corporate conduct, whether it consists of persons determined or defined by

a specific or generic character, since every person who belongs to it can be determined and indicated.

An indeterminate body is incapable of corporate conduct, as the several persons of whom it consists cannot be known and indicated completely and correctly.

To resume: we have seen that laws properly so called, together with such improper laws as are closely analogous to the proper, are of three capital classes:

1. The Law of God.
2. Positive Law.
3. Positive Morality. Consisting of—
   (α) Positive moral rules which are express or tacit commands, and are therefore laws properly so called.
   (β) Those laws (*improperly* so called) which are set by opinion.

The sanctions and duties imposed by the Law of God may be termed religious. Those of positive law—legal or political. Those of positive morality—moral.

The three main classes of law above mentioned sometimes *coincide*.

As when acts enjoined or forbidden by a law of one class are also enjoined or forbidden by those of the others respectively.

Example.—Thus murder is forbidden by positive law, by positive morality, and by the law of God.

They sometimes do *not coincide*—

As when acts enjoined or forbidden by a law of the one class are not enjoined or not forbidden by any law of one of the other classes.

Example.—Smuggling is forbidden by positive law, but is not visited with the censure of the masses.

They sometimes *conflict*—

As when acts which are forbidden or enjoined by a

law of the one class, are enjoined or forbidden by some law of one of the other classes.

Example.—In most nations of Europe, the practice of duelling is forbidden by positive law, but approved by general opinion.

[Legislators should consider, before legislating, whether the sanction of positive law is needed to suppress practices against which the other sanctions operate.]

[The frequent coincidence of positive law with positive morality and divine law has given rise to a misconception of the origin of positive law. Where positive law has been fashioned on positive morality, it is imputed to the author of the model, and not to the creator of the copy.

For example.—Customary laws are positive laws framed upon pre-existing customs, and become positive laws when clothed with legal sanctions. But because these customs were generally observed by the governed before their being clothed with legal sanctions, it is held by some that they exist as positive law by their adoption by the governed.

A further example:—

That portion of positive law which is parcel of the law of Nature is often supposed to emanate from a Divine source, which is to confound positive law with the model whereon it is fashioned.]

Two Misconceptions leading to Confusion.

1. Confusion of Positive Law with the science of Legislation and Positive Morality with Deontology.

A law which exists is a law, whether we approve of it or not.

But *Blackstone* asserting that—

'*the laws of men are of no validity if contrary to the laws of God*,'

seems to forget this fundamental fact. Laws which are most opposed to the Laws of God are constantly enforced by judicial tribunals.

Blackstone's probable meaning was, that where the Law of God and positive Law conflict, we should obey the former; which is only reasonable.

Again, Blackstone argues that a master cannot have

a *right* to the labour of his slave. But in almost every age and almost every nation that very right has been given by positive Law, and has been in many cases backed by the positive Morality of the dominant classes.

Again, *Paley's* definition of civil liberty,—

'*The not being restrained by any law but that which conduces in a greater measure to the public welfare*,' seems to be open to the same objection, especially as he distinguishes civil from natural liberty, which is the not being restrained at all.

If *civil* as opposed to *natural* liberty means anything, it is nothing less than liberty given and protected by Law, which is *right*.

Paley's definition can only apply to civil liberty or right, as it would be if it conformed to the standard of utility.

Again, in International Law, Grotius, Puffendorf, and others, have confounded International Morality *as it is* with International Morality as *it ought to be*. Von Martens is the first writer who has avoided that confusion.

Second Misconception leading to Confusion.

2. **The confusion of Positive Law with Positive Morality, and both with Legislation and Deontology.**

As, for example, at the commencement of the Digest in the passage—

'*Jurisprudentia est divinarum atque humanarum rerum notitia, justi atque injusti scientia.*'

This definition embraces not only Law but positive Morality, and even the test to which these are to be referred, as the province of Jurisprudence.

Again, Lord Mansfield, by ruling that a *moral* consideration was sufficient to support a contract, means, in other words, that the judge is to enforce Morality, and thus to assume the functions of the legislator.

C. Laws Metaphorical or Figurative.

The distinguishing mark of this class of Laws is that they have no property or character of any sort which can be likened to a sanction or duty; and, therefore, every metaphorical law wants that point of resemblance which mainly constitutes the Analogy between a law proper and a law set by opinion.

The ground of the analogy between these laws and laws proper consists in that uniformity of conduct which is one of the ordinary consequences of a law proper.

As (1) the phenomena of the irrational world follow in uniform series resembling the uniformity of conduct produced by imperative law, and (2) that uniformity is designed by a rational and intelligent author.

Confusion of Laws Metaphorical with Law Proper.

By Ulpian, in the passage at the beginning of the Pandects:—

'*Jus naturale est quod natura omnia animalia docuit . . . . jus gentium est quo gentes humanæ utuntur,*' *&c.*

He first confounds the instincts of animals with laws, and, secondly,

He confounds laws with certain motives which are the ultimate causes of laws.

By Montesquieu. In the Spirit of Laws he says:—

'*Laws in the widest sense of the term are the necessary relations derived from the nature of things. The Deity has His laws, the material world has its laws, men have their laws.*'

The various kinds of Law are here entirely confounded.

By Bentham.—A somewhat similar error is made by Bentham, who adds to the three classes of sanctions already discussed a fourth, physical sanctions, or evils brought upon the suffering party by an act or omission of his own; they affect the wills or desires of the parties liable to them

in the same way as sanctions properly so called affect the wills of the obliged.

But the application of the term 'sanction' to these evils seems unadvisable, because they are not suffered as consequences of non-compliance with the desires of intelligent, rational beings; and secondly, because the term 'sanction' commodiously expresses those evils which enforce compliance with Laws imperative and proper, or with the closely analogous Laws set by opinion.

This advantage would be lost if the term 'sanction' were extended to any evil that a man might bring on him by his own conduct.

[N.B.—Declaratory laws and laws repealing laws ought in strictness to be classed with laws metaphorical and figurative, and laws of imperfect obligation with positive Morality. But these three classes are so closely connected with positive law, that it is advisable to treat them therewith.]

LECTURE VI.

D. POSITIVE LAWS.

Every Positive Law is set by a sovereign person or by a sovereign body of persons to a member or members of that independent political society wherein that person or body is sovereign or supreme.

We shall therefore have to analyse the expressions *sovereignty*, the correlative expression *subjection*, and the inseparably connected expression *independent political society*, in order to distinguish positive Laws from the various related objects above described.

Sovereignty and independent political society are known by the following marks or signs:—

1. The BULK of the given society must be in a HABIT of obedience to a DETERMINATE and COMMON SUPERIOR, and

2. That superior one or number must NOT be in a habit of obedience to a DETERMINATE HUMAN superior.

[The relation of subjection to sovereignty.

The position of the other members towards the determinate superior is a **state of subjection** or **state of dependence**, and the mutual relation between the superior and them is called **sovereignty and subjection.** The part truly independent in an independent political society is only the sovereign one or number.]

The distinguishing marks must unite in order that a given society may form a society **political and independent.**

Positive Marks.

1. The bulk of its members must be in a HABIT of obedience to a determinate and common superior.

Example.—When the Allied armies occupied France in 1815, the occasional commands of the Allied sovereigns were obeyed by the French Government, and therefore by the French people. But these compliances did not amount to a **habit** of obedience, therefore the Allied sovereigns were not sovereign in France, and the French Government and its subjects accordingly were an independent political society.

2. The GENERALITY or BULK of the members must render this habitual obedience to a determinate and common superior.

Example.—In case a given society is split into two parts, in each of which the majority of members obey their respective superiors, then the given society is split up into two independent political societies.

3. The habitual obedience rendered by the generality or bulk of the members must be to a DETERMINATE superior.

For it is clear from previous arguments that no indeterminate party can be capable of corporate conduct, either in commanding or in receiving obedience and submission.

[These positive marks uniting constitute a given society a **society political**; to make it a society political and **independent** the fourth essential or negative mark must be conjoined.]

Negative Mark.

4. In order that the given society may be an **INDEPENDENT** political society, the certain superior must **NOT** be **HABITUALLY** obedient to a determinate human superior.

[The superior may be habitually affected by so-called laws of opinion, or he may render occasional obedience to commands of determinate parties.]

Example.—A viceroy, who habitually obeys the author of his delegated powers, constitutes, together with the people who habitually obey him, a society political but subordinate.

A Natural Society, or society in a state of nature, consists of persons who are connected by mutual intercourse, but are not members of any society political: all live in that negative state called a state of independence.

[When it is said that independent political societies live, in respect of one another, in a state of nature, it is meant that there is the same relation between independent political societies, considered as entire communities, as there is between the members of a natural society.

The rules governing the conduct of these societies towards one another are Laws set by public opinion; and though they receive the name of International Law, would more appropriately be designated 'Positive International Morality.']

A Society political, but subordinate, is merely a limb or member of a society political and independent. All the persons who compose it (including its head) are in a state of subjection to one and the same sovereign.

A Society not political, but forming part of a Society political and independent, may be exemplified by a society of parents and children living in a state of subjection.

Independent Political Society.

The definition of this term cannot be rendered in terms of precise import, and is therefore a fallible guide in specific cases. It would hardly tell us how to determine (every *independent* society, whether it were *political* or *natural*, or

of every political society, whether it were *independent* or *subordinate*.

This difficulty is owing to the want of precision attaching to the terms employed in this definition of Independent Political Society, which is distinguished by a—

POSITIVE MARK, viz. that the generality or BULK of its members must be in a HABIT of obedience to a certain and common superior; and a—

NEGATIVE MARK, viz. that the certain and common superior must NOT be HABITUALLY obedient to a certain person or body.

The difficulty is to assign their exact values to the terms '*bulk*,' '*habit*,' and '*habitually*.'

The Positive Marks illustrated

1. What number constitutes the bulk or generality of a given society, and what constitutes 'habit?'

For example.—In England the numbers yielding habitual obedience are large enough to enable us to call them the 'bulk' of the nation. In the case of the hunting and fishing tribes of New Holland, the numbers are clearly insufficient to satisfy the condition.

But in cases like the state of England during and after the Great Rebellion. At the height of the struggle England was plainly broken up into two (perhaps) political and (certainly) independent societies. After the conflict was over, at what precise time could it have been said that the bulk of the nation were habitually obedient to the body which affected sovereignty?

The Negative Mark illustrated.

Given a determinate and common superior and a habit of obedience on the part of the subjects, what constitutes freedom from a habit of obedience to a determinate body on the part of the sovereign?

For example.—Previously to the war of 1866 the smaller German States may be said to have been independent, not being in a habit of obedience to any definite and certain superior. After the war of 1870-71 the same States can hardly be said to be independent.

At what precise date did the habit of obedience to the supreme Federal Government begin?

An Independent Society to be called political and independent must not fall short of a number which may be called considerable.

It would be ridiculous, for instance, to apply to a single family the term 'independent political society,' though it might have all the marks required by the definition.

Montesquieu says, '*La puissance politique comprend nécessairement l'union de plusieurs familles.*'

The lowest possible numbers which will satisfy this condition of size cannot precisely be determined. Taking the example of the ancient Grison confederacy, we may assume that some societies may be termed political if they only comprise a few hundred members.

Societies below the limit of numbers which would enable them to be styled Independent Political societies generally are esteemed *natural* societies.

Definitions of Sovereignty and Independent Political Society, by various great Writers.

1. Bentham.—

He thus defines Political Society: 'When a number of persons, whom we may style SUBJECTS, are supposed to be in the HABIT of paying OBEDIENCE to a person or an assemblage of persons of a known and certain description (whom we may call governor or governors), such persons altogether (subjects and governors) are said to be in a state of political society.'

He also requires that the society should be capable of indefinite duration.

Austin's Criticism on Bentham's Definition.

It is defective as a definition of Independent Political Society, for it excludes the Negative Mark, *i.e.* that the sovereign must not be in a habit of obedience to any other superior; and—

Secondly, it is not a good definition of **Political Society** in general, for to distinguish Political Societies from Societies not Political we must first determine the nature of Societies political and independent, for Political Societies which are not independent are constituent portions of Political Societies which are.

2. **Hobbes.**—He postulates that the given society is not political and independent, unless it can by its own unaided strength maintain its independence.

Austin's answer to this is that it can hardly be said of any political society.

3. **Grotius.**—He defines Sovereignty thus—

'*Summa potestas civilis illa dicitur cujus actus alterius juri non subsunt, ita ut alterius voluntatis humanæ arbitrio irriti possint reddi. Alterius cum dico, ipsum excludo, qui summa potestate utitur, cui voluntatem mutare licet.*'

Austin's criticism on this definition :—

The definition supposes perfect or complete independence to be of the essence of sovereign power. But every government renders occasional obedience to commands of other governments, and also to those sentiments which are called international law, as well as to the opinions of its own subjects.

Not to be in the habit of obedience is all the independence a government can enjoy.

4. **Von Martens (of Göttingen)**—

He defines a sovereign government as one '*which ought not to receive commands from any external or foreign government.*'

Austin's criticisms :—

1. This definition would also apply to subordinate political societies.

2. Whether a government be supreme or not is a question of fact. A government reduced to subjection is actually a subordinate government, though it ought to be sovereign or independent.

3. It is in accordance with the principles of international morality (both as it exists and as it would be if fashioned on utility) that no independent government should be free from the control of its fellows.

4. There is no allusion in this definition to the positive character of sovereignty.

SOVEREIGNTY.

Considered with regard to—

1. Its forms
2. Its limits
3. Its origin.

I. Forms of Sovereignty.

An Independent Political Society is divisible into two portions, the sovereign and the subject portions; it being impossible that sovereignty should reside in all the members of the society, unless every member of it were adult and of sound mind. When the sovereign portion consists of a single member the supreme government is properly a *monarchy*.

[It has been argued that there are no monarchies properly so called, because in every so-called monarchy there is a certain class or number to whose opinion the sovereign habitually defers, for instance, the standing army in the case of the Roman Emperors, and formerly in the Turkish Empire, the corps of Janizaries. This objection, though plausible, is erroneous, for that habitual independence, which is one of the essentials of sovereignty, is habitual independence of laws, imperative and proper, and not of those laws which opinion imposes.]

When the supreme portion consists of a number of members the government may be called an aristocracy.

(Fundamental differerence between monarchies and aristocracies.

In a monarchy (or government of one) the sovereign portion of the community is purely sovereign.

In an aristocracy (or government of a number) the

sovereign portion is sovereign as viewed from one aspect, *i.e.* considered collectively or in its corporate capacity. But considered individually the various members of the sovereign number are subject to the supreme body of which they are the component parts.)

Aristocracies (in the generic sense) are divisible into three classes according to the proportion of the sovereign number to that of the entire community. If it be extremely small, the supreme government is called an oligarchy.

If this proportion be small but not extremely small—an aristocracy (in the specific sense).

If the proportion be large the supreme government is called a popular government or democracy.

Distinctions are also made between aristocracies founded on differences between the modes wherein the sovereign number may share the sovereign powers. The infinite forms which aristocracies may take have not been distinguished systematically, but some have been marked off broadly from the rest under the name of **Limited Monarchies.**

In limited monarchies there is one person who possesses a greater share than any other of the sovereign powers, but he is not a monarch in the proper acceptation of the term, but only one of a sovereign number.

[The phrase limited monarchy implies a contradiction in terms, for a monarch (so called properly) is supreme, and his power is incapable of legal limitation.]

We now discuss four closely connected topics.

1. **The exercise of sovereign powers by a monarch or sovereign body through political subordinates or delegates representing their sovereign author.**

The delegation of sovereign powers is necessary, usually in the case of monarchical, aristocratical (properly

so called), and oligarchical governments, and almost universally in the case of popular governments, as the work of government is more than can be done without the assistance of ministers.

This delegation of sovereign powers may take place in two ways :—

1. Subject to a trust or trusts.
2. Absolutely or unconditionally.

In this latter case the representative body, during the period for which it is elected and appointed, is invested entirely with the sovereign character of the electoral.

For example.—The commons delegate their powers to the members of the House of Commons, apparently in the first of the above modes, so much so that it has been held by some that the Commons' House might concur with the Peers and the King to prolong its own existence beyond the time for which its power was delegated to it.

1. The trust, however, is tacit rather than express, and on account of its vagueness and generality its nature has been misunderstood.

2. It is enforced by moral sanctions only.

2. The distinction of sovereign powers into Legislative and Executive.

According to Blackstone, the legislative sovereign powers and executive can be distinguished with precision.

He says that the former reside (in the case of England) in the Parliament (*i.e. King, Lords, and Commons*), and the latter in the King only.

But it appears from the following considerations that the legislative and executive powers cannot be so distinguished.

1. The power of making laws subsidiary to the execution of other laws, is seldom confined to either of what are called the administrative and legislative branches respectively.

2. In almost every society *judicial* powers, commonly

esteemed executive, are exercised directly by the supreme legislature.

For Example.—(α) The Decreta or judgments of the Roman Emperors.

(β) The Appellate jurisdiction of the House of Lords.

3. The sovereign administering the law through the courts of justice is the author of judge-made law.

Probably the only precise division of sovereign powers is into supreme and subordinate, the latter consisting of those which are delegated to political subordinates, or to persons who are immediate participants in the supreme power.

3. Half-Sovereign States.

According to writers on International Law, a **half-sovereign state** has most of the political and sovereign powers of a supreme government (especially with regard to powers of making war and peace), but another government has political power over it.

But—

1. **If the powers of the one government are exercised habitually** at the pleasure of the other, the complying state is **wholly subject.**

For example.—The so-called independent Princes of India, who habitually obey the commands of the British Resident.

Or 2. In many cases the seemingly half-sovereign state is really **perfectly independent.**

For example.—Frederick the Great of Prussia was deemed half-sovereign, in respect of his connection with the German Empire. But he was in the habit of thrashing its armies, and not obeying its commands.

3. In all other cases it will be found that the so-called half-sovereign state is in its own community *jointly sovereign* with the other, and is therefore a constituent member of a government supreme and independent.

For Example.—The Colonial dependencies of England which possess independent legislatures.

4. Supreme federal governments and permanent confederacies of supreme governments.

Supreme federal governments, called by some writers composite states, are no exception to the rule that in every independent political society the sovereign is either one individual or one body of individuals.

The sovereignty of each of the united societies in a supreme federal government, and also of the larger society arising from the union of all, resides in the *aggregate body* of the united governments. From this aggregate body the powers both of the general government and of the constituent societies are derived.

For—

(1.) If the general government were supreme, the several governments would be subordinate.

(2.) And if the several governments were severally sovereign, they would not be members of a (so-called) composite state, but would be a system of confederated states.

The United States of America furnish an example of a supreme federal government.

A system of confederated states must be distinguished from a composite state or supreme federal government.

In a system of confederated states, each of the several societies is an independent political society, and each of their several governments is properly sovereign or supreme.

[In composite states the united societies are severally subject to one sovereign body.]

The terms of the federal compact framed by the aggregate of the several governments are not, in the case of a system of confederated states, enforced in the various societies by the authority of the aggregate body, but by

the authority of the individual states. A system of confederated states is in fact hardly distinguishable from a number of independent governments connected by a permanent alliance.

Example.—The German Bund or Confederation.

II. Limits of Sovereignty.

It follows from the definition of a positive law as one 'which is set directly or circuitously by a monarch or sovereign body to a member or members of the independent political society, wherein that person or body is sovereign or supreme'—that the power of a monarch or of a sovereign number in its collegiate capacity is incapable of legal limitation.

For if the society is subject to a person or body not freed from legal restraints, that person must be subject to another, and so on through the series till a true sovereign is reached.

The position holds good that sovereignty is incapable of legal limitation, although sovereigns have attempted to oblige their successors.

The author of a law of this kind or any of his sovereign successors may abrogate the law at his pleasure, and if it be not abrogated the sovereign is not constrained to observe it by any legal sanction, for if he were he would not be a sovereign.

A law of this kind would to the sovereign author be nothing more than a metaphorical law—a principle assumed for the guidance of his own conduct—and to his successors it only amounts to a rule of Positive Morality.

Examples.—The Roman people made a solemn resolution never to pass what may be called a Bill of Pains and Penalties.

Though it was in the form of a law, still it was merely an ethical maxim commended by the sovereign people to their successors in the sovereignty.

Again, by the Act of Union between England and Scotland,

it is declared that the preservation of the Church of England and of the Kirk of Scotland is a fundamental condition of the Union. Assuming that Parliament is sovereign in England and Scotland, it would be absurd to say that a Parliamentary abolition of either or both these Churches were an illegal act, though it would be an immoral Act if it violated the Positive Morality obtaining on the subject among the two nations, and a sin if it conflicted with the Law of God either as revealed, or as commended by general Utility.

Though the conduct of the sovereign cannot be controlled by Positive Law, it may be influenced by Positive Morality. In this connection, the epithet Unconstitutional as opposed to Illegal may be applied to the conduct of a sovereign.

It is used in two senses :—

1. With a general and vague meaning.

It is applied to an act inconsistent with some given principle or maxim which has been expressly adopted or habitually observed by the supreme government, and is viewed with approbation by the bulk of the community.

2. With a more special meaning.

It is applied to conduct which conflicts with Constitutional Law, understanding by that expression the Positive Morality or the compound of Positive Law and Morality which determines the character of the person or persons in whom for the time being the sovereignty shall reside, and which, in the case of an aristocracy or government of a number, determines the modes wherein the sovereign powers shall be shared by the constituent members of the sovereign body.

Examples.—An **Act of Attainder** passed by the British Parliament might be said to be unconstitutional in the vague or general sense of the word.

As an instance of the second meaning—

An **Act of the British Parliament vesting the sovereignty in the Upper or Lower House** solely might properly be called an unconstitutional law. It would be absurd to call it an

illegal one, for the Parliament, being sovereign, exclusively sets us the measure of legal justice and injustice.

[Hobbes' affirmation that '*No law can be unjust*' has been termed an immoral and pernicious paradox, through a misconception of the real meaning of the expression. If put in the form—

'No Positive Law can be legally unjust,' it at once appears to be neither pernicious nor a paradox.

'*Just*' and '*justice*' are terms of varying import, and imply a reference to some standard assumed by the speaker. If Positive Law be taken as a standard, it is clear that a Positive Law cannot be unjust, for it is equivalent to saying that it is unequal to itself when used as a measure.

When *law* and *justice* are opposed, the latter term generally denotes conformity to the ultimate measure or test, namely the Law of God. In this meaning justice is nearly equivalent to General Utility.]

When it is said that the sovereign is incapable of legal limitation, the sovereign number in *its corporate capacity* is always meant. Considered severally, the members of a sovereign body are in a state of subjection to that body, and are bound legally by the laws of which the sovereign body is author.

In practice, however (though the several members of the sovereign body can be legally bound), they are commonly free from legal or political restraints.

For example.—The King as a limb of the Parliament cannot commit a legal injury. But this unanimity is not necessary or inevitable, and can be conceived as absent.

If a member considered severally, but considered as a member of the sovereign body, be wholly or partially free from legal or political obligation, still unconstitutional exercise of this legally unlimited power is restrained in two ways.

1. By the Positive Morality current in the community.

2. By inability to issue a command not consistent with the individual's share in the sovereignty.

And further, if such command were issued the persons commissioned to execute it would be amenable to Positive Law.

Apparent exception to the rule that individuals composing the Sovereign Number are subject to the Supreme Body.

The case of a **Limited Monarchy**, where the so-called limited monarch is exempted from political duty.

The answers to this are:—

1. That the so-called monarch is not *incapable* of legal obligation.

The **sovereign** is incapable of such limitation.

2. If the so-called monarch transgress the constitutional limits of his authority, disobedience to his commands would not be illegal, and his ministers would be legally amenable for their unconstitutional obedience to the sovereign.

On the other hand, the subjects are bound to obey the commands of the true sovereign, and the ministers executing them are absolved from legal liability.

3. The so-called monarch habitually obeys the laws set by the sovereign body of which he is a constituent member.

The **sovereign** cannot **habitually** obey the commands of another determinate body.

Political or Civil Liberty is the liberty from legal **Obligation**, which is left or granted by a sovereign government to any of its subjects; and since the power of such a government is incapable of legal limitation, the government is **legally** free to abridge the political liberties of its **subjects.**

Every supreme government is FREE from legal restraints, or, in other words, every supreme government is **legally despotic**. What is then the meaning of the distinction between **free** and **despotic governments**?

The probable meaning of the distinction is that a so-called '**free government**'—one of a popular form—being more likely to regard the weal of the whole community, is apt to leave or grant to its subjects more of that **useful liberty which conduces to the common weal**, than a government of one or a **few**, which may be styled '**not free**,' despotic, or absolute.

The meaning of the distinction into **free** and **despotic** (which in other words amounts to **good** and **bad**) governments, cannot be that '**free**' governments grant or leave **more** liberties to their subjects than despotic ones, **for** the excess of the liberties which the former leave may be **purely** mischievous.

That sovereignty is incapable of legal limitation is asserted by writers of the most varied views.

Sidney says:—

'*That no society can exist without arbitrary powers. The difference between good and bad governments is not that the former have them and the latter not, but that in the former these powers are placed beneficially for the governed.*

Hobbes says:—

To the civil laws, or the laws which the Sovereign makes, the Sovereign is not subject, for if he were he would be subject to himself, which is impossible.

Also, *that the difference between the forms of commonwealth consists not in a difference between their powers, but in a difference between their aptitudes to produce the peace and security of the people, which is their end.*

A Sovereign Government has no LEGAL rights against its own Subjects.

If a sovereign government had legal rights against its own subjects, those rights would be the creatures of Positive Laws set to the community by a third party.

For the idea of *legal* right presumes three several parties:—

1. *The party bearing the right.*
2. *The party burdened with the relative duty.*
3. *The party imposing the right or duty by means of a Positive Law.*

But a sovereign government may have *Divine* and *moral* rights against its own subjects.

For in the case of Divine rights there is the third necessary party imposing the right and the relative duty.

Also, so far as the members of the community are bound to obey the Divine law by the opinion of the community at large, the sovereign has *moral* rights against his own subjects severally considered.

Therefore, when we say that a supreme government has or has not a *right* to do a given act, we mean a *right Divine* or *moral*, and signify—

That we deem the act in question generally useful or pernicious, according to its agreement or disagreement with the law of God as measured by the standard of Utility.

For example.—The argument in favour of England taxing the Colonies before the American War was, that we had the **right**, *i.e.* the legal right to do so.

Burke argued that it was **inexpedient** to tax the Colonies. In other words he asserted the principle that our right to tax them was founded on Divine law, to which expediency (or utility) was our only guide.

The appearance of a sovereign government before a tribunal of its own is no argument in favour of the government having legal rights against its subjects, or lying under LEGAL duties.

A claim against the sovereign as defendant cannot be founded on Positive Law, for then the sovereign would be in a state of subjection.

And the claim of the sovereign against a subject cannot be founded on Positive Law, for then the law must be set by a third person; in other words, the society would be subject to two sovereigns, which is contrary to the definition of sovereignty.

The claims of sovereign against subject, and subject against sovereign, are treated (*by the indulgence or will of the sovereign*) *as if* they were founded on Positive Law set by a third party.

The object of a plaintiff's claim against a sovereign is begged *as a grace or favour*. So in our country procedure against the King takes the form of a '*Petition of Right*,' even though in our constitution the King is not truly sovereign, but only completely free *in fact* from legal duties.

A sovereign government may have a legal right against the subjects of another government, by virtue of a law of that government creating such right in favour of the first government.

And this possession of right is not inconsistent with sovereignty.

III. Origin of Sovereignty.

The end for which a sovereign government ought to exist is the greatest possible advancement of human happiness.

To accomplish this it must commonly labour for the good of its own community.

For the good of the universal society formed by mankind is the aggregate good of the particular societies into which mankind is divided.

From this we can infer that in a perfectly enlightened society obedience to a government would be determined by a reference to Utility.

But in actual societies which are not enlightened perfectly habitual obedience is rendered—

Partly from custom;

Partly through opinions and sentiment merely;

And partly through a perception of the utility of political government, which is the only cause of habitual obedience which is common to all nations.

The statement that 'every Government continues through the People's consent' examined.

This is true in one sense, the permanence of every government depends upon the habitual obedience which it receives from the bulk of the community, who will or consent to obey. The expression may be put thus:—

In every society, political and independent, the people are determined by motives of their own to obey the government habitually; if they ceased to do so the government would cease to exist.

But the expression also is used with another meaning, which amounts to this:—

That the bulk of every community approve of the established government, and pay it habitual obedience by reason of that approbation.

This is manifestly incorrect, the habitual obedience being in most cases due to fear of probable evils which would follow resistance.

Or again, the expression is used to mean—

That if the bulk of a community dislike the established government it OUGHT not to continue.

If every society was perfectly enlightened, this would

very nearly approach the truth, but it is not so. An ignorant people may love a bad government or hate a good one; but these mere likes or dislikes of ignorant people can only be an imperfect guide to the goodness or badness of governments.

So, too, '*every Government arises through the consent of the governed*,' in this sense, that the submission of the people is a *consequence of motives*, or that they *will* their *submission*.

The above expression is often taken to mean '**that the bulk of a natural society about to become a political, or the inchoate subjects of an inchoate political government, promise expressly or tacitly to obey the future sovereign.**

This proposition confounds *consent* with *promise*, and forms the basis of the theory of the original compact.

Theory of the Original Covenant or Fundamental Civil Pact.

In every Political Society the subjects are under duties to the sovereign one or body, PARTLY RELIGIOUS, PARTLY LEGAL, PARTLY MORAL.

[The sovereign government is under duties to its subjects, religious and moral, but NOT LEGAL.]

It would appear sufficient to assign as the origin of these duties the Divine Law (as indicated by the principle of Utility), Positive Law, and Positive Morality.

Beyond these, however, some writers refer to an *original covenant* as the basis of these duties—an original covenant which arises at the inception of a given political society.

There are three stages in the making of this pact:—

1. *The pactum unionis* or resolution of the members to unite themselves into an independent political society for a certain definite purpose.

2. *The pactum constitutionis* or *pactum ordinationis*, a determination of the constitution or structure of the sovereign political government.

3. *The pactum subjectionis*, or promises mutually made by the sovereign and subjects, out of which the relation of sovereign and subject arises.

The sovereign promises generally to govern according to the paramount end of the independent political society. The subjects make promise of due obedience.

This pact binds the successors of the original parties *religiously*, and in every society, political and independent, the religious duties of the sovereign and subjects *inter se* can only be accounted for as arising from such an original covenant or fundamental pact as has been described.

Objections to the Theory of an Original Covenant.

I. For its professed object, namely, to account for the relative duties of sovereigns and subjects, the hypothesis in question is needless and inappropriate.

1. It would hardly oblige legally, for every convention derives its efficacy from Positive Law; now, if the sovereign government were bound legally by the pact, the legal duty would be the creature of a Positive Law; and this implies *another* sovereign government, and the original sovereign would be in a state of subjection contrary to hypothesis.

And if the subjects were legally bound, the legal duty would proceed from the law set by their own sovereign and not from the pact.

2. If the sovereign and subjects were bound religiously, the duties lying on the sovereign or subjects respectively would proceed from the Divine law, and not from the pact.

Without an original covenant the sovereign and subjects are bound religiously to govern and be governed in such a way as to accomplish the end of the society. The original covenant, if consistent with that end, would be superfluous.

If inconsistent with it, it would not bind religiously.

3. If the sovereign and subjects were bound **morally** to observe the terms of the pact, the moral obligations thus incumbent would not be imposed on the sovereign or the subjects *through or in consequence of* the pact.

The efficacy of the moral sentiments of the subjects in controlling the sovereign depends upon their uniformity of sentiment with regard to the proper subordinate ends of government, more than upon their uniformity of sentiment with regard to the absolute end of government.

And if the subordinate ends are clearly conceived and definitely expressed, the government could hardly venture to offer resistance.

But assuming this control of the subjects over the sovereign by means of a uniformity of sentiment with regard to the subordinate ends of government; and assuming that the clearness with which those subordinate ends were specified would impart an answering clearness to the conceptions of the successors of the subject-founders, that effect would not be wrought by the covenant as a covenant or pact, but by reason of its being a luminous exposition of the subordinate ends of government as conceived by the subject-founders.

[There is one case in which an original covenant might generate or influence duties lying on the sovereign or subjects.

If it was believed by the bulk of the subjects that the sovereign government was bound to govern, to what they esteemed the absolute end of the government, because it had so promised, it is possible to believe that in this case the sovereign might be afraid of the anger of his subjects arising from a breach of his promise. But it will appear that where the covenant might engender any of these moral duties, it would probably be pernicious.

If an original covenant merely determined the absolute end of the sovereign political government it would be simply useless.

If it specified the subordinate ends of government it would be either useless or pernicious.

Useless, if the covenant of the founders did not affect the successors.

Pernicious in all probability if it did affect them.

An extrinsic value would be set on the subordinate ends specified in the original compact, and the age during which the community was founded would probably be less enlightened than any of the ages which would follow.]

[The best moral security for beneficent government would be the diffusion of the soundest political science, and the best religious securities would arise from worthy opinions respecting the Deity and the duties he lays upon earthly sovereigns.]

II. Second Objection to the hypothesis of an Original Covenant.

It is a fiction, and the figment could have no existence in fact.

For every convention implies a promise proffered and accepted, and the main essentials of a convention are the *signification by the promising* party of his *intention* to keep his promise, and by the promisee, that he *expects* the promising party to fulfil his promise.

Without the signification of the intention there would be no promise, and without the signification of the expectation the promise would be a mere *pollicitation*.

It is clear that in no actual society could all the members apprehend the object of a sovereign's promise, and therefore no convention could arise.

It is also clear that in no actual society could all the members fulfil the requirements necessary to the hypothesis; for all the members of the inchoate society would have to be adult persons of sane mind and sound discretion.

Historically, there is no evidence that the hypothesis has ever been realised.

Even in the case of the Anglo-American States, which at first sight appear to support the hypothesis, the parties who determined the constitution were really sovereign

before the constitution was determined; and besides that, they formed a very small portion of the community.

In most Independent Political Societies we can say that the constitution has grown, *i.e.* that the ethical maxims, derived from opinions current among the people and observed by the sovereign, arise insensibly by course of time; and it would have been impossible for the original government to promise to rule according to maxims which did not in its time exist.

A tacit original covenant, as opposed to an express one, is open to as great objections; for the *intention*, which is of the very essence of convention, is equally needed in this case as in the other.

III. Third objection to the hypothesis of an Original Covenant.

The hypothesis seems to be founded on one of two suppositions:—

1. **Where there is no convention there is no duty.** In other words, *Whoever is obliged is obliged through a promise given and accepted.* And

2. **Every convention is necessarily followed by a duty.**

These two suppositions come to this, that—

He who is bound has necessarily given a promise, and

He who has given a promise is necessarily bound.

And both these positions are **obviously false.**

For—

Duties are annexed to facts which are not pacts or conventions: and

There are pacts or conventions which are not followed by duties.

There are conventions, for instance, reprobated both by Morality and Positive Law. So that even if the sovereign and subject were parties to the original covenant, they would not of necessity be bound by it.

Distinction of Sovereign Governments into Governments DE JURE and Governments DE FACTO.

A Government DE JURE, and also DE FACTO, is one deemed lawful and just, which also receives habitual obedience from the bulk or generality of its subjects.

A Government DE JURE (and not DE FACTO) is one which is deemed rightful and just, but no longer receives the habitual obedience of the bulk of the community.

A Government DE FACTO (and not DE JURE) is a government deemed unlawful and unjust, but which receives the habitual obedience of the bulk of the community.

According to **Positive Law** the distinction of sovereign governments into **lawful** and **unlawful** is a distinction without a meaning, for—

A Government de jure is not and cannot be a lawful government by the positive law, which must be the creature of the Government de facto.

Again, a Government *de facto* is neither lawful nor unlawful, for it cannot be so by a law of its own appointment; and it cannot, according to the hypothesis of its sovereignty, be so according to the positive law of another community.

In respect of Positive Morality, the distinction, however, has a meaning.

A Government *de facto* may be lawful or unlawful—

(1.) **In respect of the Positive Morality of the community,** according as it is viewed with approbation or disapprobation by the bulk of the community;

(2.) And it may be lawful or unlawful in respect of **Positive International Morality** (though this looks mainly at possession as the test of lawfulness);

(3.) And it may also be lawful or unlawful, judged by **the Law of God** as known through the principle of Utility.

According to the Divine Law a government is lawful

if the general weal requires its continuance, unlawful if otherwise.

Completion of the definition of Positive Law.

The definition above given is:—

'*Every Positive Law (or every law simply and strictly so called) is set directly or circuitously by a sovereign individual or body to a member or members of the Independent Political Society wherein its author is supreme.*'

But this definition does not include cases of the positive law of a community, binding *persons, not members of that community*, which it manifestly may do under certain conditions, provided that the imposition of the legal duty consists with the sovereignty of the government of which the person is properly a subject.

In other words, a person amenable to a legal sanction is so far a subject of the author of the law to which the sanction is affixed.

[*For example.*—A person living within the territory of a foreign nation is bound by the Positive Law to a certain extent, and is amenable to its sanctions; and this is consistent with the sovereignty of his own government.]

[By what marks are we to distinguish the members of a given society from persons who are not its members?

There are various modes—by birth, residence, naturalisation, &c.

But it is only in relation to any particular society that the questions can be completely resolved.]

Restrictions of the statement that a Sovereign cannot be bound Legally. See p. 37.

As being sovereign in its own community, the Sovereign Government cannot be bound legally, but as being a subject of a Foreign Supreme Government (either generally or for certain limited purposes), which it can be if it only habitually obeys laws laid upon it as a subject of the foreign community, it can be so bound.

[*For example.*—The Cantonal Government of Berne once had

money in the English funds, and might have been permitted to hold land in England also; if so, it would have been liable to all the duties wherewith land is saddled in England.]

Restrictions of the statement that a Sovereign cannot have Legal Rights against his own Subjects.

Against a subject of its own as being partially or generally a subject of a foreign government, a Sovereign Government may have legal rights.

For example.—As against a Russian merchant domiciled in England the Russian Emperor may have a right to recover in the English courts money due under a contract. He bears his right as being to a limited extent and for limited purposes an English subject. And this is not inconsistent with the true sovereignty of the Emperor in Russia.

LECTURE XI.*

Section II.—General Jurisprudence distinguished from Particular.

Having determined the province of Jurisprudence, we proceed to distinguish General Jurisprudence, or the philosophy of Positive Law, from Particular Jurisprudence, or the science of any such system of Positive Law as now actually obtains or once actually obtained in a specifically determined society.

The subject of general Jurisprudence is the sum of the principles abstracted from positive systems of law; the object of general Jurisprudence is the exposition of such principles.

By general Jurisprudence we are to understand '*the science concerned with the exposition of the principles, notions, and distinctions which are common to systems of law* (understanding by systems of law those maturer and ampler systems which are especially instructive).

* The preceding six Lectures contain the substance of the first ten Lectures delivered orally. They were published in their present form in 1832.

Of these principal notions some may be esteemed necessary, *i.e.* as necessary parts of any system of law evolved by a refined community.

For instance, the following :—

1. **The notions of Duty, Right, Liberty, Injury, Punishment, Redress, with their various relations to one another and to Law, Sovereignty, and Independent Political Society.**

2. **The distinction between written and unwritten law**—*i.e.* between law proceeding immediately from the sovereign, and law proceeding immediately from a subordinate author.

3. **The distinction of Rights availing against the world at large and rights availing exclusively against persons specifically determined.**

4. **The distinction of Rights available against the world at large into property or dominion and the variously restricted rights carved thereout.**

5. **The distinction of obligations** (or duties corresponding to rights against persons specifically determined) into **those arising from Contracts, those arising from Injuries,** and those arising from incidents which are neither contracts nor delicts—which obligations are styled analogically '**Quasi ex contractu.**'

6. **The distinction of Injuries into Civil Injuries** (or private delicts) **and crimes** (or public delicts), with the distinction of civil injuries into torts or delicts in the strict sense of the term, and breaches of obligations ex contractu or quasi ex contractu.

Some again of the principles, notions, and distinctions which belong to general Jurisprudence are not necessary—*i.e.* we can conceive them as absent from a coherent system of law, though in fact we generally find them present.

For example.—The distinction of Law into Jus Rerum and Jus Personarum, an arbitrary but commodious basis for an arrangement of the body of law.

The resemblance between different systems and the description of such of the subjects and ends of law as are common to all systems will be found to cover a large part of the field of our investigation, though the systems to which attention should be paid are few, for instance—the writings of the Roman jurists, the decisions of later English judges, and the French and Russian codes as to arrangement.

Jurisprudence must sometimes be implicated with Legislation.

It is impossible to consider Jurisprudence quite apart from Legislation, for in explaining the mechanism and origin of laws we must sometimes advert to the considerations of expediency which lead to the establishment of those laws.

In General Jurisprudence the main principles and distinctions should be stated in an entirely abstract form, but should be illustrated from a particular system.

The Roman law is the best system from which illustrations can be drawn. For it has supplied the actual bases of the systems of law existing in some of the countries of Europe, and has largely influenced others, and *by reason of its perfection as a positive or technical system* has largely tinctured the language of the International Morality which those nations affect to observe.

Falck says of the Roman Law :—(Jurist. Enc. ii. 109.)

> '*It is not the matter of these juristical writings (the Pandects) so much as the scientific method employed by the authors in explicating the notions and maxims with which they have to deal, that has rendered them models to all succeeding ages.*'

Again, Savigny—

> '*It is upon this possession of leading principles that the greatness of the Roman jurists rests; their theories are so thoroughly worked out as to be fit for immediate application.*

and their practice is uniformly ennobled by scientific treatment.'

Hobbes, in the 'Leviathan,' distinguishes the subject and scope of General as distinguished from Particular Jurisprudence:—

'By civil law I understand the laws that men are bound to observe because they are members, not of this or that commonwealth in particular, but of a commonwealth: for the knowledge of particular laws belongeth to them that profess the study of the laws of their several countries.'

Uses of the study of Jurisprudence.

A well-grounded knowledge of the general principles of Jurisprudence helps to a well-grounded knowledge of the principles of English Jurisprudence.

In the Prussian Universities the studies are almost entirely confined to the general principles of Law.

This course is also advocated by Hale, Mansfield, and Blackstone.

Furthermore, the utility of the study of Jurisprudence is especially marked with respect to—

1. The administration of law in our dependencies wherein foreign systems of law obtain.

2. The systems of Law founded on the Roman and Canon Law, applied in our own courts to a variety of objects.

3. Questions arising even in the courts which administer indigenous law.

4. Questions coming before the Privy Council, a tribunal which has to decide questions arising out of numerous systems without the court or the advocates having any specific knowledge of them.

In each of these cases a knowledge of Jurisprudence would prove of material assistance.

LECTURE XII.

SECTION III.—Analysis of pervading Notions.

I. **Rights: the creatures of law properly so called.** [Rights also arise from other sources, *e.g.* the law of God and laws sanctioned morally :—

(1.) These, like the obligations to which they correspond, are *imperfect*, not being armed with the legal sanction ; and

(2.) So far as Positive Morality consists of laws improper, the rights arising from it are rights by *way of analogy*.]

In analysing the idea of **legal right**, we must advert to the meaning of the following terms :—

1. **Law, Duty, and Sanction—**

For every **right** is the creature of **law**, and implies an **obligation** and a **sanction**.

2. **Person, Thing, Act, and Forbearance—**

For rights reside in persons and are conversant with things, acts, and forbearances.

3. **Injury, Wrong, or breach of Obligation or Duty—**

For, as rights imply obligations and sanctions, so do obligations or sanctions imply possible injuries or wrongs.

4. **Intention and Negligence—**

For every injury supposes intention or negligence on the part of the evil-doer.

5. **Will or Motive—**

For the import of these expressions is implied in '*intention*' and '*negligence*;'

And **obligations** operate upon the will.

1. Law, Duty, Sanction.

Every Law (properly so called) **is a command**; **by** every command **an obligation is**, by means of the corresponding sanction, **imposed** upon the person to whom the command is addressed.

If the party is commanded to do or perform, this is a **positive** duty; if to forbear, a **negative** one.

[**Bentham** calls forbearance a negative service, thereby transferring to the object of the duty an expression which applies correctly to the duty itself.]

If the duty has a right answering to it, it is a **relative** duty;

If it has no such right it is an **absolute** duty.

2. Person, Thing, Act, and Forbearance.

Persons are of two classes, (α) **physical** and (β) **legal** persons.

(α) By '**person**' simply, or '**physical person**,' is meant here '**human being**' in the widest sense of the term.

The modern civilians have narrowed down the import of the term to '*a human being invested with a condition or status*' (using the word status as including those conditions which comprise rights), so their definition may be thus stated:—

'*A person is a human being invested with or capable of rights.*'

But this was not the opinion of the Roman classical jurists.

In all their divisions of persons **slaves** are ranked as **persons** and **status is ascribed to them.**

Persona and *homo* are with them equivalent expressions.

Origin of the mistake.

A person was defined by the modern civilians as '*a person bearing a status*,' and *status* was taken as equivalent

to *caput*, a word denoting conditions which do comprise rights; whereas *status* was applied to various conditions of persons considered merely with regard to their incapacities.

[The term person is sometimes used as synonymous with *status* or *condition*. In this sense every human being who has rights and duties bears a number of persons. '*Unus homo sustinet plures personas.*' The word in this sense is in fact equivalent to character.]

(β) Fictitious or legal persons.

These are of three kinds:—

1. **Collections or aggregates of physical persons.**
2. **Things, in the proper acceptation of the word.**
3. **Collections or aggregates of rights and duties.**

***Example of*—1.** *The collegia of the Roman law.*
2. *The prædium dominans and servions.*
3. *The hæreditas jacens.*

They are persons by a figment for the sake of brevity in discourse. By ascribing rights and duties to feigned persons instead of to the physical persons they really concern, we are able to abridge our descriptions of them.

[The subject of Political and Civil liberty is intimately connected with that of '*personæ*.']

Civil liberty (or Legal) is the absence of Legal Restraint.

[Physical freedom is the absence of external obstacles, and moral freedom the absence of motives of a painful sort.]

Liberty is synonymous with right: in liberty the prominent idea is *absence of legal restraint*, the secondary idea is the security for the protection of that right.

Whereas right *denotes* the security for the protection and connotes the absence of restraint.

Right and liberty seem to be synonymous, meaning—

1. Permission on the part of the sovereign to dispose of one's person or any external object (subject to certain restrictions); and—

2. Security against others for the exercise of such right and liberty.

[Where protection is afforded '*Right*' is the proper word; as against the government, or rather, a member of it, '*Liberty*' is more frequently used, as against the sovereign there can be no legal right.]

LECTURE XIII.

Thing, Act, Forbearance.

Definition of Thing.

Things are such permanent objects, not being persons, as are sensible or perceptible through the senses.

For example.—A house, a horse, or a piece of gold.

Things are opposed on the one hand to *persons*, on the other to *acts* of persons and to facts or events.

Things resemble persons inasmuch as they are permanent objects perceptible through the senses.

And **differ from persons,**

inasmuch as persons are capable of being invested with rights, and subject to obligations; and

Things (except by a fiction) are incapable of rights and obligations.

Things differ from facts or events in that things are permanent external objects, while facts or events are **transient** objects.

[By the epithet permanent as applied to a sensible object, we here mean that the object is perceptible *repeatedly*, and is considered by those who perceive it as being one and the same object;

And by *transient* as applied to sensible objects we mean that the objects are *not* perceptible repeatedly.

In this sense all things are permanent and no things are transient.

But things may be distinguished into those which are *more* and those which are *less* permanent, and to these we may apply the terms *permanent* and *transient* respectively.]

Use of the word Thing (Res) by the Roman Jurists.

Res is often extended in meaning to include things strictly so called, and acts and forbearances considered as the objects of rights and duties.

Again, by the Roman jurists,—

Things are divided into—

1. **Corporeal or tangible,** *res corporales*, including—

(α) **Things strictly so called,** permanent external objects, not persons.

(β) **Persons** considered as the subjects of rights or duties residing in others.

(γ) **Acts and forbearances** considered as the objects of rights and obligations.

2. **Incorporeal things.**

By this expression they understood rights and obligations themselves.

The word '*Res*' accordingly has two widely different meanings with the Roman lawyers.

1. It denotes things, acts, forbearances, and sometimes even persons considered as the subjects or objects of rights and obligations.

2. It also has a meaning which includes beyond these rights and obligations themselves. In this widest sense the word *Res* embraces the whole matter with which law is conversant.

[In the English law we have corporeal hereditaments, *i.e.* things opposed to incorporeal hereditaments, which are rights.]

[The Roman lawyers sometimes consider a slave a thing viewed as the subject of the dominion residing in the master, but, generally speaking, a slave is styled *servilis persona*.]

Distinction of Things into Moveable and Immoveable.

Moveable things are such as can be moved from the places they occupy without an essential change in their actual natures.

Immoveable things are such as cannot be so moved.

[But things **physically** moveable may be considered in law immoveable by reason of their intrinsic character, *e.g.* the key of a door; and things immoveable may be by law considered moveables, *e.g.* money directed by a trust to be laid out in land will descend to the heir like land, by the doctrine of the Courts of Equity.]

Division of things into—

Things determined specifically and things determined generically (*i.e.* by reference to the classes to which they belong).

For example.—The field called Blackacre (determined specifically), or **a field** (determined generically).

Division of Things into Fungible and not Fungible.

When the subject of the obligation is a thing of a given class, the thing is said to be **fungible**, *i.e.* the delivery of any object which answers to the *generic* description will satisfy the obligation.

When a thing which is the subject of an obligation is of such a character that it must be delivered in specie (*i.e.* that the very individual thing, and not another member of the same class, must be delivered), then it is called **not fungible.**

Division of Things into RES MANCIPI and RES NEC MANCIPI.

A distinction of Roman law founded on a form of conveyance only applicable to certain objects to which the expression '*Res mancipi*' applied. All other objects as subjects of conveyance were '*nec mancipi.*'

Division of things into *Res singulæ* and *Universitates Rerum.*

Res singulæ are themselves individual and single, and cannot be divided without destroying their actual nature.

Universitates rerum **are lots or collections of individual things.**

A sheep is an example of the first class, a flock of sheep of the second.

[The reason of these distinctions and divisions is that the meaning of terms may be known, and consequently their legal value; for instance, in conveyances, to make up for the indefiniteness of the general name, we attach a list of as many parts of it as we can think of that no one may be left out. A clear definition of the original term would obviate this necessity.]

[The distinction between **Jura rerum** and **Jura personarum** in Roman law involves the use of the word '**persona**' as equivalent to **status or condition**, so that Jus personarum = the **law of status or condition**; and

Jus Rerum is the law of Rights and Obligations considered in a general manner, and distinguished from those peculiar **collections of rights and duties which are called Conditions**]

LECTURE XIV.

Act and Forbearance.

Persons and things may be contra-distinguished from events as follows:—

Persons and Things.	Events.
1. Each is an object perceptible by *sense*.	1. *Not every event* is a sensible object: some events are only perceptible to the senses of the individual whose mind is conceived of as in operation.
2. Each is capable of being *perceived repeatedly* and as considered as being on each occasion the same object.	2. Events are transient—*not perceptible repeatedly*.

The class of events to which we have to advert are human acts and forbearances.

Acts will be taken to mean—'**such motions of the body as are consequent upon determinations of the will.**'

[Bentham applies the term **internal acts** to **determinations of the will.**]

Forbearance—

A forbearance is the not doing of some external act (*negative element*) in consequence of a determination of the will (*positive element*). It is this union of the two elements which distinguishes forbearance from inaction, which is merely negative.

[Necessary digression to explain the meaning of the words **subject** and **object** used with reference to rights and duties.

When **acts or forbearances** are styled the **objects** of duties, it is meant that the duties are imposed upon the persons obliged, in order that they may act in the manner specified.

When **persons or things** are styled the **subjects** of rights it is meant that the acts or forbearances which are the **objects** of those rights relate to those persons and things. The expression is employed only in regard to those rights which avail against persons generally:

[*For example.*—The right of the master in or to his servant. The **object** of the right would be the forbearance of all persons from interfering with the servant: the **subject** of the right would be the servant himself.

Also, when a right has for its object acts or forbearances to be rendered by a person or persons, it is said to **avail against** such person or persons.]

We are now in a position to treat of an important distinction between rights.

Rights *in rem* and Rights *in personam.*

Definition.—Rights in *rem* are those which avail

against persons generally: rights *in personam* **are those which avail exclusively against certain or determinate persons.**

[This distinction pervades the writings of the Roman institutional writers, though the exact terms do not occur. The full expression for *jus in personam* is *jus in personam certam sive determinatam.*

N.B.—The expression '*in rem*' denotes, not the **subject**, but the **compass** of the right—it denotes that the right in question avails against persons generally, and not that the right is a right over a thing.]

Corollary to the definition.

Duties which correlate with rights *in rem* are always **negative**, *i.e.* duties to **forbear** or **abstain.**

Of duties which correlate with rights *in personam* some are negative, but most are positive, *i.e.* obligations **to do** or **perform.**

Instances of Rights in rem.

1. Ownership or property.

It is the right to use or **deal** with some given subject in a manner which, though not unlimited, is indefinite.

All other persons are bound to forbear from acts which would prevent the enjoyment or exercise of the right.

Every **positive** duty which may regard the right and every negative duty which binds **exclusively certain** persons must flow from some right collateral to the right of property.

Ownership therefore is a right residing in a person, over or to a person or thing, and availing against other persons universally or generally.

Where the subject of a '*jus in rem*' is a *person*, the party invested with the right has a *jus in personam* also against the subject.

2. Servitus; Servitudes.

Servitus is a right to use and deal with in a certain **definite** manner a subject owned by another.

[In ownership the right of dealing with the subject is larger and indefinite.]

Servitus avails against all mankind, including the owner of the subject, and implies an obligation upon all to forbear from every act inconsistent with the exercise of the right.

Any positive duty which is attached to the servitude answers to some extraneous and collateral right, and not to the *jus servitutis*.

Instances of rights *in personam*.

1. Rights which arise from contract.

Rights arising from contracts avail against the parties who bind themselves by the contract (and their representatives), but as against all other persons they have no force and effect.

For example.—A buys a book of B, who contracts to deliver it. Instead of so doing he sells it to C.

A has a *jus in personam* availing against B:

1. Before the sale, to enforce specific performance of the promise.

2. After the sale, to enforce satisfaction for the non-performance of the contract.

If, however, in consequence of B's promise, the ownership of the book is transferred to A, then A has a *jus in rem* availing against the world.

2. Rights of action, with all other rights founded upon injuries, are jura in personam, for they answer to obligations attaching upon the determinate persons who are authors of the injury.

[The expression '*actio in rem*' is misleading, as it is a name which, being applicable to the violated right, is extended improperly to the remedy.]

Rights *in personam* are rights to acts and forbearances, and nothing more. A so-called jus ad rem acquirendam, or, more fully, jus *in personam* ad *jus in* rem *acquirendum*, is a right availing against a determinate person to the acquisition of a right availing against the world at large; or,

in other words, it is a right to a conveyance on the part of the person obliged.

The same instrument or transaction being at once a contract and a conveyance, sometimes leads to confusion, *e.g.* when a so-called contract passes an estate (or right *in rem*), it is so far not a contract, but a conveyance. So far as it gives a *jus in personam* it is a contract.

Example.—The sale of a specific moveable is in the English law a conveyance.

[Terms applicable to the two great classes of rights and obligations:—

1. Rights availing against persons generally or universally may be termed rights in rem.

2. Rights availing against persons certain and determinate—rights in personam.

3. Obligations incumbent upon persons generally and universally—offices or duties.

4. Obligations incumbent upon persons certain and determinate would receive the proper name of obligations.

Obligations considered universally would be called '*offices*' or '*duties*.']

LECTURE XV.

Rights in rem which are Rights over Persons.

Of these we may give as examples:—

1. The right of the father to the custody and education of his child.

2. The right of the guardian to the custody and education of his ward.

3. The right of the master to the services of the slave or servant.

As against the child, ward, and servant, these rights

are rights *in personam*; as against the world at large they are rights *to the exercise* of the various rights impliedin the relations of father and child, guardian and ward, master and servant, without molestation from the rest of the world.

The person who is the *subject* of this right '*in rem*' occupies an analogous position to that of a *thing* which is the subject of a similar right, for instance, *considered as the subject of the* real right which resides in the parent, the child might be styled a *thing*; in short, whoever is the *subject* of a right which resides in another person, and which avails against a third person or persons, is placed in an analogous position to a thing, and in respect of that analogy may be termed a '*thing*.'

This *analogical extension* of the meaning of the word thing is employed—.

1. By the **Roman lawyers**, who styled the slave considered as the subject of a real right residing in the master, a thing.

2. By some **modern civilians** (Heineccius and others) the filiusfamilias considered as the subject of the real rights residing in the paterfamilias has been classed with things.

[Common error of supposing that the slave was not considered by the Roman jurists as belonging to the class of Persons. Considered as bound by duties towards his master and others the slave is ranked among physical persons. Considered as the subject of the right residing in his master, and availing against third persons, he is occasionally deemed a 'thing,' but is usually deemed a person rather than a thing, and is called 'servilis persona.'

In no passage of the classical jurists is the filiusfamilias styled a thing.]

Rights in rem without determinate Subjects.

These are not rights over things or persons, but are rights to forbearances only.

Examples—

1. **A man's right or interest in his good name.**—Persons in general are bound to forbear from such imputations as would amount to injuries towards his right to his reputation, which is therefore a right *in rem*; but there is no subject, thing or person, over whom it can be said to exist.

2. **A monopoly, a patent right, a franchise.**—In all these cases there is no subject, person or thing, over which the *real* right can be said to exist.

3. **The right of the heir to the heritage** (in Roman law), or the right availing against the world at large to the aggregate of rights forming the heritage, which right he could maintain by a real action, *i.e.* one grounded on an injury to a real right,

4. **A right in a *status* or condition.**—A right in a status or condition (considered as an aggregate of rights and capacities) is also a real right.

[By the Roman law a right in a status might be asserted directly and explicitly by an action expressly for its recovery: in the English law (excepting certain actions peculiar to the court for divorce and matrimonial causes) no such action can be brought. Hence the question of status occupies very little of the ground of English law.]

LECTURE XVI.

Rights considered Generally.

1. **The nature, essence or properties common to all rights.**

Every right is a right *in rem* or a right *in personam*.

Rights *in rem* reside in a determinate person or persons and avail against *other* persons generally.

Duties corresponding to rights *in rem* are negative, *i.e.* are duties to forbear.

Consequently all rights *in rem* reside in determinate persons, and are rights to *forbearances* on the part of persons *generally*.

Rights *in personam* reside in a *determinate* person or persons, and avail against a person certain or determinate. The correlating duties are either to do, or to abstain from an act.

Hence it follows that—

1. **All rights reside in determinate persons.**

2. **All rights correspond to duties or obligations incumbent on other persons.**

3. **All rights are rights to acts or forbearances on the part of the person or persons bound.**

Rights in the abstract may be thus described:—

A monarch or sovereign body commands that one or more of his subjects shall do or forbear from acts in respect of a certain determinate party. The persons who are to do or forbear are said to be subject to a *duty*. The person towards whom those acts are to be done or forborne is said to be invested with a *right*.

Certain definitions of a '*Right*' examined.

1. '*A right is the security for the enjoyment of a good or advantage which one man derives from a duty imposed upon another or others.*'

2. It has also been said that rights are powers, *powers to deal with things and persons.*

Objections—

(*a.*) All rights are not powers over things or persons. All or most of the rights styled rights in *personam* are merely rights to acts and forbearances.

And many of the rights styled '*jura in rem*' have no subject.

(*b.*) The party invested with a right is invested with that right in consequence of the corresponding duties being imposed upon others, and this duty is enforced by the power

of the state, not by that of the person who is invested with the right.

[The definition of right as '*facultas faciendi aut non faciendi*' is open to the same objections as the last.]

(*c.*) Right, *the capacity of exacting from others acts or forbearances.*

Objection.—The means of exacting the act or forbearance, *i.e.* the sanction enforced by the State, is not expressly adverted to.

Austin's brief definition.

'*A party has a right when another or others are bound or obliged by the law to do or forbear towards, or in regard of him.*'

LECTURE XVII.

Duties.

Having explained those duties which have rights corresponding to them, we now proceed to treat of those duties which have no corresponding rights. They are called Absolute duties.

Every legal duty is imposed by the command of the sovereign. It answers to a right when the sovereign commands that the acts shall be done to a determinate party other than the obliged.

All other duties are absolute.

A duty is absolute,

1. When the acts are to be done or forborne towards or in respect of the person on whom the duty is imposed, *i.e.* when the duty is *self-regarding*.

2. When the acts are to be done or forborne towards persons *not determinate*, other than the obliged.

3. Where the duty imposed is *not one towards man*.

4. Where the duty is to be observed *towards the sovereign* imposing it.

[Self-regarding duties and duties not towards man are only properly so called with regard to their proximate scope; considered with reference to their more remote purposes they are absolute duties regarding persons generally.

Example—The duty incumbent on a person not to commit suicide is a self-regarding duty in regard of its proximate purpose, to the end of deterring him from taking his own life; but remotely it is imposed to benefit the community by deterring its members generally from suicide.]

So with relative duties and their correlating rights, they are conferred in numerous instances with the direct aim of promoting the public good, and indirectly to the same extended purpose.

Owing to a misconception of the above, the ground of distinction between Public and Private Law, according to the Roman lawyers, is that Public Law '*ad publicè utilia spectat*,' Private Law '*ad singulorum utilia spectat*.' For it is clear that as the general interests are the aggregate of individual interests, law regarding the former and law regarding the latter regard the same subject.

The true distinction seems to be that Private Law regards persons as not bearing political characters, Public Law regards them as having political characters.

Again, Blackstone thus distinguishes—

Civil injuries and crimes. The former, he says, are private wrongs and concern individuals;

The latter are public ones, and concern the State.

But this is untenable.

All offences affect the community and *all* offences affect individuals.

Some are not offences against *rights*, and are, therefore, pursued directly by the sovereign.

It is in the difference of procedure that the distinction between civil injuries and crimes lies.

An offence pursued by or at the discretion of the injured party or his representative, is a civil injury; one pursued by the sovereign is a crime.

Examples of the classes of Absolute duties.

1. Self-regarding duties.—The proximate purpose of which is the advantage of the person obliged.

Examples of violation of these—
Suicide, drunkenness.

2. Absolute duties, the proximate purpose of which is the advantage of persons indefinitely.

Example.—The duty of military service in most countries.
Violations.—Arson (on account of the danger to the public).

3. Absolute duties, the proximate purpose of which is not the advantage of any person or persons.

Example.—Our duties towards the lower animals.

LECTURE XVIII.

Will and Motive.

Every legal duty is a duty to do or forbear from an outward act or acts, and is imposed by a command of the sovereign.

To fulfil the duty is right, non-fulfilment is an injury; the evil conditional on non-fulfilment is the sanction. The nature of legal injuries and sanctions must, therefore, be investigated before we can complete the analysis of right and duty. And to determine the import of injury and sanction we must settle the meaning of the terms Will, Motive, Intention, and Negligence. For—

1. The sanction or conditional evil determines the will of the person obliged to the act or forbearance.

2. Acts and forbearances which are the objects of duties are the consequences of volition or determination of the will.

3. Some injuries are intentional, others are consequences of *negligence*. Both *intention* and *negligence* run through the doctrine of injuries or wrongs. And *intention* meets us at every step in every department of jurisprudence. But to settle the import of the terms Intention and Negligence it is necessary to settle the import of the term *Will*, for *will* and *intention* are inseparably connected, and negligence implies the absence of a due volition and intention.

The Will.

Certain movements of our bodies follow invariably and immediately our wishes or desires for those same movements. When we speak of the *Will* or power of willing, all that we mean is that we wish the movement, that we expect the movement to follow the wish, and that it does follow accordingly.

In the case of all wishes other than those immediately followed by the bodily movements wished, the object of the wish is attained through a mean or a series of means.

For example.—I wish that my arm should move, and the bodily movement follows the wish.

I wish to lift up a book; and I wish certain bodily movements which are the mean or instrument for attaining my ultimate end.

The dominion of the will is limited to some of the bodily organs.

The motion of the heart, for instance, cannot be quickened by a wish on my part that it should do so.

The dominion of the will does not extend to the mind.

For changes in the state of the mind are not to be attained by merely desiring or wishing those changes, but are the result of a long series of means beginning with desires which are really volitions.

For example.—Taking up a book to banish an importunate thought.

The movement of the body to take up the book is willed: then follows a series of means by which the ultimate end is attained.

Volitions, then, are such desires as are *immediately* followed by the bodily movements desired.

Acts (*properly so called*) are such bodily movements as immediately follow our desire of them.

[A confusion arises from the term '*acts*' being employed in an extended sense to mean,—

'*Acts with certain of their consequences.*'

For example.—A shoots B. The long train of incidents included in that expression are considered as one act; whereas the only one of those incidents which is willed (and consequently the only act), is the actually raising and firing the pistol. The subsequent incidents are consequences of the act which is willed, and are not willed, but intended. In short, acts are willed and consequences intended.]

Motive and Will.

A motive is a wish causing or preceding a volition; a wish for something not to be attained by wishing it, but which the party believes he shall attain by *means* of those wishes which are called acts of the will.

Again, **motives may precede motives.**

For the desired object which determines the will may be desired as a mean to an ulterior purpose, in which case the desire of the object which is the ultimate end prompts the desire which immediately precedes the volition.

[The subject of the will has attracted much attention, for the business of our lives is carried on by bodily movements, which are the objects of volitions; and also volitions are the only desires which consummate themselves.]

LECTURE XIX.

Intention.

[Throughout this work Austin applies to **Will, Volition, and Motive**, the meanings above given.

Acts must be taken to include **Acts properly so called and certain of their consequences**, as it is impossible to discard current forms of speech]

Acts properly so called are the bodily movements which immediately follow our desires of them; they are followed by *consequences*.

To desire the act is to will it, to expect the consequences is to intend them.

Will includes intention, *i.e.* every act that is willed is intended.

But intention does not imply will, for the consequences of an act are never *willed* though generally **intended** (sometimes *consequences* are *not intended*).

Where an agent *intends* a consequence, he may either wish it or not wish it.

If he wishes it he may wish it as an *end*, or as a *mean* to an end.

Strictly speaking, no external consequence is desired as an end, for the ultimate purpose of every volition is a feeling or sentiment—pleasure arising directly or indirectly. But where the pleasure can only arise from a given external consequence, that consequence is styled with sufficient accuracy the end of the act or volition.

Where an intended consequence is wished as an **end** or a **mean**, motive and intention concur. The consequence intended is also wished, and the wish of the consequence suggests the volition. Hence the frequent confusion of motive with intention, as in English law, where murder is

always described as committed 'of malice aforethought,' meaning simply 'intentionally.'

Examples of the three varieties of intention above described:—

1. The agent may intend a consequence as an end.

For instance.—A to appease his mortal hatred of B shoots him.

B's death is intended as an end.

The agent may intend a consequence as a mean.

2. A shoots B to get his purse.

B's death is intended as a mean. The ultimate motive is the desire of getting the purse.

3. The consequence may be intended and not wished for.

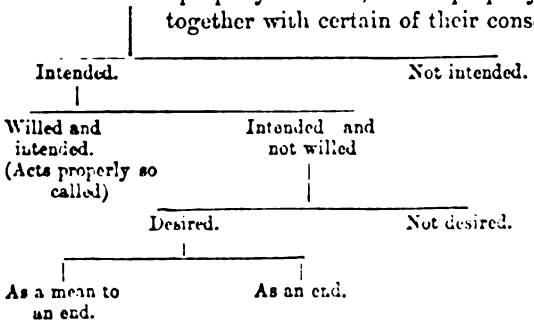
A shoots at B with the intention of killing him. C is standing close by and is shot instead of B.

Here C's death is intended (inasmuch as its possibility is contemplated by A), but it is not desired.

Forbearances are intended and not willed.

This follows from the nature of volitions. In the case of a *forbearance* an act is *willed* other than the act which is abstained from; and from a knowledge that the act willed excludes the act forborne, the agent *intends the forbearance.*

[The subject may be illustrated by the following table:—



LECTURE XX.

Negligence, Heedlessness, and Rashness.

Omission and forbearance distinguished.

To forbear is not to do, with an intention of not doing.

To omit is not to do, without thought of the act not done.

Culpable omissions receive the name of **negligence.** Negligence is distinguished from **heedlessness** thus:

Negligence consists in the *omission* of an act and the *violation* of a *positive duty*: the act is omitted because the agent does not advert to it.

Heedlessness consists in the *performance* of an act and the *violation* of a *negative duty*: the act is done because the agent does not advert to its probable consequences.

Rashness consists in the *performance* of an act and the *violation of a positive duty*: the act is done because the agent does not advert sufficiently to the probable consequences of the act.

> *Example.*—A fires at a mark chalked on a wood fence. He does not sufficiently advert to the chances of wounding somebody on the other side. This is example of rashness.

Rashness, Heedlessness, or Negligence were by the Roman jurists, in some cases, considered equivalent to *dolus*, *i.e.* to intention.

The meaning of the Roman jurists in assuming that these expressions were equivalent, probably amounts to this:—In certain cases it is impossible to determine whether the agent intended, or whether he was negligent or rash. In such cases it is to be presumed (in a civil action) that he intended, and his liability adjusted accordingly.

But a clear line of demarcation can be drawn between *Intention* and *Negligence*.

To intend is to believe that a given act will or may follow a certain volition or act; intention is therefore a state of *consciousness*.

But *negligence* and *heedlessness* imply unconsciousness; in the first case the party does *not* think of a given act; in the second he does *not* advert to a given consequence.

If the agent advert to the act or to the consequence he *intends*.

If he does not do so, he is heedless, negligent, or rash.

Dolus.

Dolus strictly denotes *fraud*. It also by an extension of its meaning signifies *intention* or *intentional wrong*: the reason probably is that fraud imports intention, and for want of a name which would denote intention the Roman lawyers expressed it by the name of a something which necessarily implied it.

Culpa.

As opposed to dolus, *culpa* imports negligence, heedlessness, or temerity, as well as indirect intention (*i.e.* of consequences intended, but not desired).

As opposed to *negligentia*, *culpa* is restricted to delicts—injuries done through *culpa* in this sense, '*faciendo semper admittantur*.'

Injuries done *negligentiâ* (when opposed to *culpâ*) in this sense comprise all breaches of obligations, and are committed '*faciendo aut non faciendo*.'

[The word malice is used of indirect intention in the English law in much the same way as dolus in the Roman.]

Summing up—In Roman Law:—

Infortunium (absence of dolus and culpa) = unintentionality and absence of intention.

Culpa sine dolo = unadvisedness with heedlessness, or misadvisedness with rashness.

Direct intentionality = **Dolus**.

Oblique intentionality = **Culpa**.

LECTURE XXI.

Present Intention to do a future Act.

A present intention to do a future act differs from doing an act with a present intention.

In the latter case the act is willed and done. In the former it is neither willed nor done, though it is intended.

It may be defined to be—

'*A present* desire *of an object* (*either as an end or a mean*) *with the present* belief *by the party that he will do acts hereafter for the purpose of attaining it.*'

It is by this *belief* that the *simple desire* of the object is distinguished from the *intention*.

A present intention to do a future act is also distinguished from a present volition and intention thus: In the latter case we presently will and act, expecting a given consequence.

In the former case we neither presently will nor presently act, but presently expect or believe that we shall will hereafter.

[Such expressions as '**resolving**' and '**determining**,' as applied to a present intention to do a future act, simply denote that we desire the object intensely, and that we have a correspondingly strong belief that we shall resort to means of attaining it.]

It is clear that we may presently intend a future forbearance as well as a future act, and all that can be said in general of intentions to act in future may be applied with but slight modifications of intentions to forbear in future.

An intended consequence of an intended future act is not always desired, for we may intend or expect that the act, which we presently believe that we shall hereafter will, may be followed by consequences which we do not desire.

The execution of every intention to do a future act is necessarily postponed to a future time.

Such intention is *revocable* or *ambulatory, i.e.* the desire which is the ground of the intention may cease before the intention is carried into execution.

It may also be *matured* or *not matured.*

When a long series of acts and means is a necessary condition to the attainment of the desired end the determination of this series is styled 'the compassing of the desired object.'

Attempts.

When one or more acts have to be done in succession before a desired object can be attained, doing any one of the acts which precede the last is styled an attempt.

When a criminal intention is evidenced by an attempt, the party is punished in respect of the criminal intention.

The reason for requiring an attempt is probably the danger of a mere confession being admitted.

Intention considered apart from its relation to injuries.

In all cases we shall find intention reducible to one of two notions :—

1. A present volition and act with the expectation of a consequence; or—
2. A present belief on the part of the person in question that he will do an act in the future.

For example.—The '*intention of the legislator*' expresses either the purpose with which he made the law, or the sense which he annexed to his own expressions, and that in which he hoped others would understand them. In either case we mean that he willed and performed a given act expecting a given consequence.

The intention of contracting parties is the sense to be inferred from the words used, or from the transaction, or both, that one party gave and the other received the promise.

[Paley's definition.—'When the terms of a promise admit of more senses than one, the promise is to be performed in that

sense in which the promisor apprehended at the time that the promisee received it,' would lead to this, that a mistaken apprehension by the promisor of the apprehension of the promisee would exonerate the promisor.]

The true rule is the understanding of both parties. If the understanding of the parties differed materially there is no consensus, and consequently no contract. And if a written instrument contain the terms of the contract, it is the only admissible evidence of what those terms were.

[The sense of the promise, being the meaning which each party attaches to the words or the transaction, is a totally different thing from the intention. Each of the parties does a present act expecting a given consequence.]

LECTURE XXII.

Sanction.

Sanction is evil incurred or to be incurred by disobedience to command.

Obligation is liability to that evil in the event of disobedience, and consequently regards the future.

[If the party has acted or forborne agreeably to the command, he has wholly or in part fulfilled the obligation.

In positive duties performance extinguishes duty and right.

In case of negative duties the duty can never be extinguished by fulfilment, though it ceases if the right be extinguished.]

Sanctions operate upon the DESIRES of the obliged.

In the case of positive duties they may be said to act upon the *will*.

But if the duty be negative—Then the desire of avoiding the evil which impends from the law causes the agent to *forbear*, and this forbearance is *intended*, but not *willed*; for the party either wills an act inconsistent with

the act forborne, or remains in a state of inaction which excludes it.

In the case of a positive duty it may be said that we are obliged through our wills; for the force of the obligation lies in our *desire* of avoiding the threatened evil, to avoid which we *will* the act which is commanded.

An obligation to *desire* (in the sense in which desire is opposed to will) is not possible; for, although we desire to avoid the sanction, we are not necessarily averse from that which the law forbids, and *vice versâ*.

When we desire what the law forbids, or are averse from that which the law enjoins, we observe our duty, *because* our aversion to the sanction overcomes the conflicting wish. There is here no *conflict of will and desire*, as is currently stated, but a conflict of a stronger with a weaker desire. And this stronger desire (of avoiding the sanction) does not extinguish, though it masters and controls, the sinister desire; except that in the way of association, through the thought of the act or forbearance which constitutes the breach of duty being constantly associated with the thought of the sanction or evil, and through the desire of avoiding this evil being stronger than the desire of the consequences following the given act or forbearance, we look upon the act or forbearance as a source of probable evil, and thus regard it with aversion. So the stronger desire of avoiding the sanction extinguishes the weaker one for the consequences of the act.

When the fear of the evils impending from the law has *extinguished the desires* which urge to breach of duty, the man is just; in other words, when he loves justice for itself, and not because he fears the sanctions which impend from the law, he is *just*.

[This is not the only source of such a benevolent disposition, for love of justice is also partly generated by considerations of the utility of justice and by the love of general utility felt by all more or less strongly.]

When a man's desires habitually accord with his duties we say he is just.

When they are habitually adverse we say that his mind is disposed to injustice.

[N.B.—We often speak of a deliberate intention to do a criminal act as 'a depraved will;' but it is manifest that badness or goodness cannot be affirmed of the will at all.]

LECTURE XXIII.

Physical Compulsion distinguished from Sanction.

The compulsion implied in duty and obligation is hate and fear of an evil which we may avoid by desiring to fulfil a something which we *can* fulfil if we wish.

All other compulsion or restraint may be termed Physical.

For example.—A man is imprisoned in a cell from which he could escape if he tried, but is deterred by fear of the probable evil if he succeeded. In this case the man is *obliged* to stay in the cell.

But if a man is imprisoned in a cell, of which the door is locked, physical restraint is applied to his body. Whether he will escape or not depends not upon his desires.

Physical compulsion may apply to the mind as well as the body.

[We have seen that the dominion of the will does not extend to the mind.]

For a change in the mind may be wrought or prevented whether we desire the change or not, *e.g.* the change of mind produced by evidence which leads a person to admit a conclusion though he does not wish to admit it.

[We cannot be obliged to suffer or not to suffer. The only

possible objects of duties and obligations are **acts** and **forbearances**, which **do** depend upon our desires, and by which we may **induce** or **avert** suffering. Suffering is the ultimate sanction; but we cannot be obliged to suffer, for that would postulate our being obliged to something which does not depend on our desires.]

LECTURE XXIV.

Guilt, Imputability.

The import of these terms must be considered before we can estimate fully the nature of **Injury** or **Wrong**.

Certain forbearances, omissions, and acts are wrongs or injuries; and their authors are violators of duties and obligations. The parties forbearing, omitting, or acting are **guilty**, and their plight is styled **guilt** or **imputability**.

Negligence (the omission of a given act through not adverting to it), **Heedlessness** (the performance of an act through not adverting to its probable consequences), and **Rashness** (the performance of an act through insufficient advertence to it), are severally essential component parts of injury or wrong (as is also **Intention**, of which hereafter). But action, forbearance, or omission is also a necessary ingredient. Intention (in the sense of present intention), negligence, heedlessness, or rashness, is not in itself wrong; but in order to place the agent in the position of imputability the intention, rashness, or negligence must be referred to some act, forbearance, or omission of which it was the cause.

[With regard to present intention to do an act in the future, it is possible that mere consciousness might be treated as a wrong. We might be obliged to forbear from such intentions as are settled, deliberate, or constantly recurring. The fear of punishment might prevent such frequent recurrence, and the pernicious act to which the intentions when recurring frequently would lead.]

7

Restriction of Guilt or *Culpa* to Intention, Heedlessness, &c., as the CAUSE of Action, Forbearance, Omission, &c

An opinion prevails among German jurists that to constitute guilt the will of the party must have been in such a predicament that the criminal fact may be imputed, *i.e.* that the criminal fact may be imputed as effect to the state of his mind as cause.

In other words, *Culpa* DENotes the state of the party's mind, although it CONnotes the positive or negative consequences of the state of his mind.

'Injury' and 'Guilt' are merely the contradictory of 'Obligation' and 'Duty.'

Parties are obliged to do or forbear with various modifications.

If they are obliged to *do* they are bound not to omit the act negligently or intentionally.

If they are obliged to *forbear* they are bound not to do the act negligently or rashly.

So, if a person omit an act negligently or intentionally, he breaks a positive duty.

And if he does an act negligently he breaks a negative one.

An injury is, therefore, the contradictory of that which the law imposing the duty enjoins or forbids.

Meaning of the phrase *Corpus delicti.*

Corpus delicti is a collective name for the sum or aggregate of the various ingredients which make a given fact a breach of a given law.

Thus, an attempt may be distinguished from consummation of a criminal purpose. For want of the consequence there is not the corpus of the principal delict. But the intention, coupled with an act tending to the consequence, constitutes the corpus of the secondary delict styled an attempt.

LECTURE XXV.

Intention or inadvertence is of the essence of Injury.

[This was assumed at p. 84.]

There can be no breach of duty unless the sanction were capable of operating as a motive to the fulfilment of the duty; and the sanction operates upon the obliged in a two-fold manner,

1. By counteracting the motives or desires prompting to a breach of duty.
2. By tending to excite the attention which the fulfilment of the duty requires.

And unless the party knew or might have known that he was violating the duty, the sanction could not operate at the moment of the wrong.

Therefore, Injury supposes unlawful intention or unlawful inadvertence (*i.e.* negligence, heedlessness, or rashness).

Anomalous exception in English Law.

It frequently happens that in cases of obligation, arising directly from contract, when time for performance is not determined by the contract, performance is due so soon as the obligee desire it.

For example.—If I buy goods I am bound from the moment of delivery to pay the price to the seller. In this case and similar ones it is impossible that the obligation should be broken through inattention or inadvertence, until the obligee desire performance, and the obligor be informed of the desire.

According to the rule in the Common Law Courts, the creditor may sue the debtor as for a *breach of obligation* at once, without a previous demand.

This is justified by the argument that an action is in itself a demand.

This argument is opposed to the view that a right of action is founded on an injury, that unlawful intention or injury is of the essence of injury, and that in cases such as the one under consideration there is no room for unlawful intention till the creditor desire performance and the debtor be apprised of the desire.

The principle applied to the possession of res aliena. If the possession be *malâ fide* it is itself a wrong, and the obligation is ex delicto.

If the possession be *bonâ fide* it is not a wrong; the obligation being *quasi ex contractu*. But *on notice given* by the person entitled, further possession becomes either a breach of the quasi contract or a violation of the *jus in rem* residing in the person entitled.

The Roman Law consistently maintains the principle that intention is of the essence of Injury.

In all cases the institution of an action must be preceded by notice to the debtor, provided he can be found.

The non-performance of an obligation is in Roman Law styled '*mora*,' for the debtor delays performance. The predicament in which the debtor is placed in consequence of his non-performance is also called *mora*.

> *For example.*—A bailee is in mora if he refuse to return a bailment on demand, and is liable for accidental damage.

Speaking generally, if no time be fixed for performance, the debtor is *in morâ* only after demand by the creditor. But if a particular time be fixed for performance, the debtor by non-performance becomes *in morâ*, without demand by the creditor. The rule in Roman Law is '*Dies interpellat pro homine.*'

> [Breach of contract is no exception to the principle. For though in our law we distinguish actions ex contractu from actions ex delicto, yet the former are founded on injury as much as the latter.]

Recapitulation.

Unlawful intention or unlawful inadvertence is therefore of the essence of injury, because the sanction could not have operated upon the party as a motive to the fulfilment of the duty unless he had been conscious that he was violating the duty, or unless he would have been conscious of it if he had attended as he ought.

Grounds of Exemption from Liability.

These are mostly reducible to the same principle, *i.e.* that the party is clear of liability because—

1. He is clear of intention or inadvertence, or
2. He is presumed to be clear of intention or inadvertence.

i. *Casus* or Accident.

No one is liable for a mischief resulting from accident, *i.e.* from some event (*other* than an act of his own), which he was unable to foresee or, foreseeing, was unable to prevent.

But by virtue of an obligation arising *aliunde* he may be liable (though he is not liable *as for an injury or wrong* in respect of the accidental mischief).

> *For example.*—A makes a '*depositum*' with B. The subject of the deposit is destroyed accidentally. B is not liable **as for an injury**; but if by another contract B has agreed to keep the deposit safely, then he is answerable on the contract.

ii. Ignorance or Error.

Ignorance of fact is another ground of exemption.

Though the proximate ground is ignorance or error, the ultimate ground is the absence of unlawful intention or inadvertence.

> [For if the ignorance could have been removed by due attention or advertence, the act is imputable to heedlessness, heedlessness, or temerity.]
>
> *For example.*—If intending to kill a burglar who has broken into my house I strike and kill (in the dark) my own servant, the mischief is attributable to **inevitable** error.

Ignorance of Law.

For an obligation to be effectual—

1. The party must know the law imposing the obligation to which the sanction is annexed.

2. The party must know (or must be in such a position that with due advertence he might know) that the given act would amount to a breach of the obligation.

Unless these conditions concur, the sanction cannot operate upon his desires.

Ignorance of fact is therefore in every system of Law a ground of exemption.

Ignorance of Law is generally not a ground of exemption.

The reason given in the Pandects is—

That ignorance with regard to fact is often inevitable; that is to say, no attention or advertence could prevent it. But ignorance of law excuses none, for the law both can be and ought to be knowable.

[Answer to this—

That it mistakes what is for what ought to be.

No actual system is so knowable.]

Blackstone follows in the same line, urging that every one *may* know the law and *is bound to know* it.

This asserting that ignorance should not excuse *because the party is bound to know* is to adduce the rule as a reason for itself.

The true argument in favour of the general rule seems to be that if ignorance of law were admitted as a ground of exemption, the Courts would be occupied with questions impossible of solution, as to whether the party was ignorant of the law at the time of the wrong done, and, assuming his ignorance, whether it was inevitable.

The admission of ignorance of fact as a ground of exemption is not attended with these disadvantages, for the inquiry is limited to a given incident.

In our own law the rule holds almost universally. In the Roman Law there are certain classes of persons '*quibus permissum est jus ignorare*,' *e.g.* women, children under age, and soldiers. The reason is that it is presumed that their information does not extend to a knowledge of law.

[But even these classes of persons cannot allege with effect their ignorance of those parts of the law which are founded on the jus gentium.

This corresponds to our division of **malum in se** and **malum prohibitum**.]

The objection to *ex post facto* laws is consonant with the general principle that intention is of the essence of injury. The law not being in existence at the time of the injury being done, there could have been no sanction to operate as a motive to obedience, there being nothing to obey.

There could, therefore, be no injury, because no intention to break a law.

LECTURE XXVI.

[Digression on presumptions of Law.

Presumptions are of two classes, *Presumptiones hominis* and *presumptiones juris*: the latter may be subdivided into *presumptiones juris* and *presumptiones juris et de jure*.

Presumptiones hominis, or presumptions simply so called, are drawn from facts of which the law has left the probative force to the discretion of the judge.

A *presumptio hominis* is not necessarily conclusive even if no proof to the contrary be adduced.

Presumptiones juris are inferences drawn in pursuance of the preappointment of the law. Proof to the contrary is admissible in these cases, but till it is adduced the presumption holds good.

Presumptiones juris et de jure.—In these the law predetermines the probative force of the fact, and also forbids the admission of counter evidence.]

iii. Infancy and Insanity.

An infant or an insane person is exempted from liability because it is a *presumptio juris* that he is not *doli capax*, or capable of consciousness that his conduct conflicts with the law. This capacity may be established by appropriate evidence.

In the case of an infant less than seven years old the inference of incapacity is a *presumptio juris et de jure*.

This is not inconsistent with the statement, that ignorance of the law is not (*per se*) a ground of exemption, for in the above cases ignorance of law is only considered as one of the grounds of exemption in company with others from which it cannot be severed.

iv. Drunkenness.

In the Roman Law drunkenness (unless it was the consequence of an unlawful intention) was a ground of exemption, even in the case of a delict. Drunkenness is assumed to be similar to infancy and insanity, according to this view.

In English Law drunkenness is no exemption.

v. Sudden and Furious Anger.

In English Law this is never a ground of exemption.

In Roman Law it is admitted if it be such as to exclude all consciousness of the lawfulness of the act, in the same way as drunkenness and insanity.

When the party is answerable for deeds done in furious anger it is in respect of his having neglected that self-discipline which would have prevented such anger.

[The case of *imperitia* or want of skill is treated in the same way.]

[The distinction between delicts and quasi-delicts of the Roman Law seems to be illogical.

For example.—The imperitia of a physician is a delict.

That of a judge, a quasi-delict.

But the ground of liability is in both cases the same, the taking upon himself by the injuring party of functions he was not qualified to exercise. And the right violated being in each case one in rem, they are both delicts.]

Grounds of exemption not depending on the foregoing principle.

The party is exempted in some cases in which the sanction might act on his desires, but in which the fact does not depend on his desires.

For example—

1. **In case of physical restraint:**

The agent may be conscious of the obligation, but the sanction would not be effectual if applied, because the agent could not perform the obligation.

2. **In case of extreme terror:**

The agent is urged to a breach of the duty by a motive stronger than any sanction; and as the sanction would be inoperative, its infliction would be unadvisable.

[The above cases are rather instances in which the notion of obligation is wanting, because the sanction could not be operative.]

LECTURE XXVII.

Sanctions.

Sanctions may be divided into two classes:—

1. Those which are enforced at the discretion of the injured party, or of his representative, *i.e.* Civil or Private Sanctions.

2. Those which are enforced at the discretion of the

sovereign or state, as exercised according to law, *i.e.* Criminal or Public Sanctions.

By some it is urged that the object of criminal sanctions is the prevention of wrongs,

That of civil, the redress of wrongs.

But the remote and paramount end of a civil sanction, as well as that of the criminal one, is the *prevention* of wrongs.

And further, actions, such as the Roman penal actions, are sometimes given to punish the wrong doer as well as to give redress to the injured party.

It is also held that the *prevention* of future injuries is the sole end of a criminal proceeding, and that the prevention of injuries *and* the redress of the injured party is the object of civil proceedings.

But this will not hold, for in those civil actions which are called *penal* the action is given for the mere purpose of punishing the wrong doer.

Laws are sometimes sanctioned by nullities:

For example.—The legislature annexes rights to certain transactions on certain conditions—to contracts, for instance: If the conditions be not observed the transaction is void or voidable.

Some sanctions are vicarious,—they only act on us though sympathy.

For example.—Forfeiture for treason, which punished the children for the fault of the father.

Various meanings of the word Sanction:

1. In the sense used above—a conditional evil annexed to a law to produce obedience to that law.

2. Blackstone limits it to punishment under a criminal proceeding, and the Roman lawyers applied it to the clause in a penal law declaring the punishment.

3. It also is used as equivalent to '*confirmation by legal*

authority,' as when we say that a bill is sanctioned by Parliament.

4. In the Digest, 'sanction' is used of the law or the body of law collectively; if in beginning of digest, *Totam sanctionem Romanam*—all the Law of Rome.

END OF PART I.

Part I. consisted of definitions of leading terms: in **Part II.** we proceed to consider Law with reference to its **Sources** and to the Modes in which it begins and ends.

PART II—LAW IN RELATION TO ITS SOURCES AND TO THE MODES IN WHICH IT BEGINS AND ENDS.

LECTURE XXVIII.

Meaning of the phrase 'Sources of the Law.'

1. In one of its senses the source of a law is its **direct or immediate author.**

[If the immediate author be the sovereign, the metaphor is properly used; if a subordinate, the phrase is improperly used, but may be retained for convenience.]

2. It also means the **original or earliest extant monuments** or documents from which the body of the law may be known or conjectured.

[More properly the phrase viewed in this light means—'*Sources of the knowledge conversant about laws*,' '*fontes e quibus juris notitia hauritur.*']

For example.—In Roman Law the extracts from the classical jurists contained in Justinian's code.

In English law, the statutes and law reports.

Law considered with reference to its sources is usually distinguished into **Law Written** and **Unwritten.**

According to the Modern Civilians—

Written Law is made immediately and directly by the supreme legislature.

Unwritten Law is not so made, but owes its validity to the authority of the supreme power.

This may be called the judicial meaning of the phrases.

According to the Roman Lawyers—

Written Law was that which was committed to writing at the outset.

Unwritten Law was law not so committed to writing.

This may be called the grammatical meaning of the phrase.

Though the phrases written and unwritten law give rise to misapprehension, yet in the *judicial* sense they embody an important distinction of laws into—

1. Those made directly and immediately by the supreme legislature; and

2. Those not so made, but deriving their validity from the sovereign.

Of the first class we may take as examples—

1. **Our own Acts of Parliament,** made directly by the sovereign parliament.

2. **The ordinances made by the États Généraux in France** while they subsisted, and by the kings afterwards.

3. **The leges, plebiscita, and senatus consulta** of the Romans (*in liberâ republicâ*).

During the Commonwealth the supreme legislative power resided in the Roman people (senate and *plebs*). When this power was exercised by the whole *populus* assembled in curies or centuries the enactments were called '*leges*.'

When exercised by the *plebs* with the concurrence of the senate, *plebiscita*.

When exercised by the senate with the concurrence of the plebs (as signified by the tribunes of the plebs) *senatus consulta*.

4. **The constitutions of the Roman Emperors.**—After the destruction of the Commonwealth the legislative

power was long exercised in constitutional forms, and the emperor was in theory merely '*princeps senatûs*.' After the accession of Hadrian, however, the emperors openly legislated as monarchs and autocrators.

These imperial constitutions were called *principum placita*, and were either General or Special.

General constitutions (*edicta, leges edictales, epistolæ generales*) established a law or rule of a universal or general character, and not regarding specifically a single person or case.

Special constitutions regarded specifically single persons or cases. They were of various characters.

α. The extraordinary Mandate, or an order addressed to a civil or military officer to regulate his conduct generally, or in some specific case.

β. The Privilegia imposed on some single person an anomalous or irregular punishment, and were then called '*odious*.'

Or conferred on some single person an anomalous or irregular right, and were then called '*favourable*.'

A patent right granted by Parliament would in our law illustrate the latter, and an act of attainder, the former class of *Privilegia*.

γ. Decreta and rescripta.—

These were made by the emperors in their capacity of sovereign judges.

A decrete was an order on regular appeal from a lower tribunal.

A rescript was an order preceding the judgment in a lower tribunal, directing the judge how to decide the case.

Examples of laws not made directly and immediately by the sovereign legislature, but deriving their authority therefrom.

1. Laws made by subordinate legislatures in the direct or legislative manner.

For example.—

(α) Acts of the Governor-General of India in Council, issued under authority of Parliament (the right to legislate for India being expressly reserved by Parliament).

[Canada possesses (by grant of the British Parliament) full powers of legislation, subject to the veto of the Queen in Council. The British Parliament, accordingly, is not sovereign in Canada.]

2. By-Laws made by corporate bodies.

These are made by the various bodies, but owe their validity to the authority of the sovereign.

For example.—The Board of Trade Regulations and Schemes of Charity Commissioners.

3. Laws made in the way of direct legislation by courts of justice.

These are made by the courts or by persons holding judicial offices not in their judicial capacities, but by a power of proper legislation conferred on them by the supreme legislature.

For example.—

(α) The Rules of Practice laid down by our Courts of Law.

(β) The arrêts réglementaires of the French parlements which were in the nature of general statutes.

(γ) The edicts of the Roman prætors forming the body of law called the Jus prætorium. They were general laws made and published in the way of direct legislation by virtue of a power at first assumed by the prætors, and afterwards confirmed to them by the supreme legislature.

4. Laws made in the way of judicial decisions by subordinate tribunals.

[For laws, as has been observed already, are occasionally made in this way by the sovereign himself, *e.g.* the rescripta of the Roman emperors.]

[Laws originating in customs and in the opinions of jurists are not distinguishable from other laws in respect of their source, for they derive their effect as law, not from the jurists, but from the judge or legislator, who interposes his authority to them.]

5. **Autonomic Laws.**

These are laws established by private persons, to which the legislature lends its sanction.

For example.—A father or guardian may prescribe to his child or ward certain conduct which the Courts of Justice will compel him to follow.

LECTURE XXIX.

The distinction between written and unwritten law (in the judicial sense) is also denoted by the opposed expressions—

Promulged and unpromulged.

Law made by the supreme legislature is said to be promulged, and law emanating from a subordinate source is said to be unpromulged.

[For the purpose of this distinction we must understand the word promulged to mean 'published for the information of the persons bound by the law,' and, if there is only one person or a few persons so bound, this promulgation is taken to be sufficient to answer the purpose for which promulgation is necessary.]

But the words do not accurately represent the distinction.

For, firstly—

Laws established immediately by sovereign authors are not necessarily promulged.

[As a matter of fact, the general or edictal constitutions of the Roman emperors were not binding till they were published.

Hence, probably, the application of the term 'promulged' to such laws as proceed immediately from sovereign authors.]

The rescripts of the emperors and others of their special constitutions were exclusively addressed to the persons whom they specifically regarded. Yet they were set immediately by their sovereign authors.

In England an Act of Parliament becomes *obligatory* from the moment it has received the royal assent, and no promulgation is requisite, as it is a presumption *juris et de jure* that it is known to the subjects.

Blackstone's reason for this is, '*that every man in England is, in judgment of law, party to the making of an Act of Parliament, being present thereat by his representatives.*'

Secondly—

Law may be generally published, though emanating from a subordinate source.

For example.—The law or equity of the prætors, which was published for the guidance of all whom it might concern.

The distinction between Written and Unwritten Law in the Grammatical sense.

According to the distinction, taken in this sense, laws are styled written or unwritten with regard to the difference in the mode of their origin, and not with regard to a difference in their source.

Any law which, by the authority of its immediate maker, is written at the time of its origin is styled Written Law.

Any law not so written is styled Unwritten Law. This was the only distinction between written and unwritten law recognised by the Roman lawyers.

For example.—The prætorian edicts and the *responsa prudentium* (as well as *lex*, *plebiscita*, *senatus consulta*, and *principum placita*) are styled *jus scriptum* by Justinian

(Just. i. 2, 3). But the prætorian edicts are clearly unwritten law in the juridical sense of the term.

Customary law is, according to Justinian, *jus non scriptum*; for, assuming that it exists *consensu utentium*, it must originate *sine scripto*.

Law made by subordinate tribunals, or through judicial decisions, may belong to either class (*sensu grammatico*); if committed to writing in the first instance it would be written law, if not, unwritten.

The distinction between written and unwritten law, *sensu grammatico*, corresponds with the meaning of the phrases in French law, '*Pays de droit écrit*' and '*Pays de coutumes*,' the former being the country where the Roman law (which was written law in the grammatical, but not the juridical sense, not being established by the direct consent of the sovereign) prevailed. It was written law, *sensu grammatico*, inasmuch as it existed in writing before it was adopted by the French courts.

Hale and Blackstone adopted the juridical sense of the distinction between written and unwritten law. But the latter seems to confound the two meanings when he speaks of unwritten law thus: '*I style these parts of our law* leges non scriptæ, *because their original* institution and authority are not set down in writing.'

The terms proper to the English law are not written and unwritten, but Statute and Common Law, a division which excludes law made in the direct mode by subordinate legislation.

Distinction between Law established directly (*i.e.* by the legislature) and Law established obliquely (*i.e.* by judicial decisions).

(This distinction depends on the modes in which laws originate and not on their sources.)

Whether established directly or obliquely, a law may emanate from the sovereign or from a subordinate source. When a law is established directly the object is the estab-

lishment of a law or rule; when indirectly, the decision of a specific point or case.

At an early period of a nation's history we generally find the legislative and judicial functions in the hands of the same person or body; in our own country the two functions have become more widely separated than in any other.

The two classes of law above considered will respectively be styled '*Law made directly*' and '*Law introduced and obtaining obliquely*,' or '*Law established in the way of* **judicial** *legislation*.'

[The term **Judge-made Law**, as used by Bentham, of part of this latter class, will be rejected as tending to confound the **sources** with the **modes** of the origin of law.]

LECTURE XXX.

Certain supposed Sources of Law examined.

Every positive law is established either immediately by the monarch or sovereign body exercising judicial or legislative functions, or by subject individuals or bodies exercising delegated powers of judicial or direct legislation.

But it is by some writers supposed that there are positive laws which exist as such independently of a sovereign authority.

The first of these kinds of law is—

I. Customary Law.

Customary laws may be divided into two classes:—

1. Those styled **notorious**, which are enforced by the tribunals without *proof* of their existence.

2. Those *needing proof* before enforcement by the tribunals.

This division does not agree with the division of laws into General and Particular (General as prevailing throughout the country; Particular as prevailing only in portions of it). General customary laws are of the class termed '*notorious*,' but of particular customary laws some do not need proof (*e.g. the custom of Gavelkind*) and others do.

The civil and canon laws as obtaining in England are ranked by Blackstone and Hale with particular customary laws. They would more accurately be styled '*singular*' (in the sense of the Roman jurists), as not possessing harmony or consistency with the rest of our system. But they are undoubtedly portions of the general law of the land.

We will first take the class of **Notorious Customary Laws**, or General Customary Laws, together with such Particular Customary Laws as are enforced by the tribunals without proof of their existence.

1. A customary or moral rule may become a legal rule through adoption by the sovereign or subordinate legislature, in which case it is styled **Statute Law**; or

2. It may be taken as the ground of a judicial decision to serve as a precedent, in which case it is called **Judiciary Law.**

> [Custom, which is the cause of the moral rule, is by a confusion of terms, as exemplified in the meaning often attached to customary law, supposed to be the source of the positive law founded on it.]

According to either of the above suppositions the source of the legal rule is the legislator or judge, as the case may be; though when clothed in the judicial mode with the legal sanction the law is commonly called "**Customary Law**,' notwithstanding that it owes its existence as law, like every other law, to the sanction of sovereign authority.

A current Hypothesis regarding the Source of Customary Law refuted.

It has been held by many jurists that all the judiciary law administered by the Common Law courts is customary law, and exists by force of immemorial usage as positive law.

Answers to this argument:—

1. *All* the customs immemorially current in the nation are not legally binding, which they would be if the positive laws founded on some of them obtained by force of immemorial usage.

2. Supposing that customary law existed as positive law *consensu utentium*, it could not be abolished except with the consent of its imaginary founders. But positive, as founded on customary, law is often abolished by Parliament.

3. According to the hypothesis, customary laws are transmuted into positive laws when their existence as such is declared by decisions of the Common Law courts.

But if they existed as positive laws *because* the people had observed them as *customary rules*, these declarations and decisions would not be necessary. As a matter of fact, much of the judiciary law administered in the Common Law courts is not founded on immemorial usage—Mercantile law, for instance.

4. The hypothesis in question seems to disregard the judiciary law administered by other tribunals than the Common Law courts.

The origin of the theory, that customary law obtains as positive law, '*consensu utentium*,' probably lies in the passage of Julian (Digest, i. 3, 32): '*Inveterata consuetudo pro lege non immerito custoditur. Et hoc est jus quod dicitur* moribus constitutum. *Nam quum ipsæ leges nos alii ex causâ nos teneant quam quod judicio populi receptæ sunt merito et ea quæ sine ullo scripto populus probavit tenebunt*

omnes. Nam quid interest populus **suffragio** *voluntatem suam declaret an rebus ipsis et factis?'*

Objections to the passage:—

1. It confounds an act of the people in its sovereign capacity with the acts of its several members.

2. The position would be plausible *if the people were* really sovereign, but under an oligarchy or monarchy it appears absurd that the laws formally established by the virtual monarch and the customs observed by the governed should be referred to the same source.

Blackstone says, in commenting on the passage above quoted, '*It is one of the characteristic marks of English liberty that our common law depends upon custom which carries this internal evidence of freedom along with it, that it was probably introduced by the* **voluntary consent** *of the people.*'

But customary law exists as positive law on establishment by the sovereign. If the people have no share in the sovereignty they can have no part in the introduction of positive law.

And under oligarchies and monarchies much of the prevailing law is customary, so that it cannot be a mark of freedom, a term which means, if anything, that the government is purely or partially popular.

Blackstone may have meant that the customs on which the law is produced are necessarily introduced by the consent of the people, or are necessarily consonant with their interests and wishes.

If the people are enlightened and strong this position might be tenable.

If they be ignorant and weak, custom as well as law will commonly be against them.

For instance, the slavish condition of the lower classes in the Middle Ages was due to custom, and law framed upon it. The body of the people in many European

countries have been relieved by direct legislation from the evils with which they were before burdened.

II. The second class of laws supposed to exist as positive laws independently of a sovereign authority consists of:—

'Jus prudentibus compositum,' or law constructed by private jurisconsults respected for their knowledge and judgment.

It will appear by reasoning similar to that in the case of customary law that the *opinions of these jurists* may be **causes**, but cannot be **sources** of law. Their opinions derive their effect as law from the interposed authority of the judge or legislator.

> [According to a story in the Digest the tribunals in the reign of Augustus were instructed to take the law in certain doubtful cases from the dicta of certain jurisconsults who were named. If so, these were judges of the law, and not merely private individuals.]

In our own law the authority of the prudentes, or, as we should call them, the text-writers, is sunk, and the decisions really framed on their opinions are considered declarations of law established by immemorial custom.

III. The third class of these Laws consists of Law Natural or Universal.

The Divine being or nature is not a source of law in the strict sense. Law fashioned on a Divine or natural original exists *as law* by the establishment of the human sovereign.

The Divine being or nature is the **remote cause**, and not the **source** of such law.

The extension of the term '*source*' to include every '*remote cause*' leads to endless confusion. Thus '*Jus quod natura inter omnes homines constituit*,' '*Jus moribus constitutum*,' '*Jus prudentibus compositum*,' derive their names from their *remote cause*, and not from their source.

Again, in our own legislation we see a similar result, as when an Act of Parliament is associated with the name of its remote cause; for instance, 'Lord Campbell's Act,' the source of any such Act being the supreme government.

LECTURE XXXI.

Jus Gentium.

(1.) The Jus Gentium as conceived by the Early Roman Jurists.

1. According to the Roman law members of independent nations not in alliance with the Roman people had no rights as against Romans, or against other aliens.

A member of a state in alliance with Rome only enjoyed such rights as were conferred by the provisions of the alliance.

> [It is probable that aliens were protected from actual violence and spoliation while residing in Roman territory; with this exception the above proposition is probably true.]

(2.) Aliens, members of conquered nations, were not admitted to the rights of Roman citizens, nor were they stripped of all rights.

Generally speaking, they retained their own government and laws, so far as was consistent with a state of subjection to Rome. It is laid down in the Digest that the law peculiar to each particular region shall, if possible, be applied, and, in default of this, the law of Rome.

Hence arose this difficulty. By what law could rights of members of subject communities against Romans, or against the members of another subject community, be enforced.

To meet this difficulty the *Prætor peregrinus* was ap-

pointed to administer justice in Italy between Romans and members of Italian states, and between members of any of those states and members of any other.

[This prætor was styled **peregrinus** because his jurisdiction was exercised more frequently in questions between foreigners than in those between Romans and foreigners. The old-established prætor was now called **urbanus**, in contradistinction to the other.]

A body of subsidiary law applicable to the questions that came before the new prætor was gradually established by his successive Edicts, founded on a comparison of the various systems or bodies of law which came under his cognisance.

The body of law thus formed acquired the name of the '*Jus Gentium*.'

The term originated either in the fact that this body of law was *jus omnium gentium*, as opposed to the law of a particular state, viz. Rome.

Or it may have meant law conversant about foreigners (gentes being used in opposition to *cives*, a distinction similar to that of Ἕλληνες καὶ βάρβαροι, '*Jews and Gentiles*.')

The *jus gentium* of the prætor peregrinus was extended by the Roman governors in the various outlying provinces, and it naturally was nearly uniform throughout the Roman world, as all its immediate authors were representatives of the same sovereign.

As distinguished from the systems of law which were respectively peculiar to Rome and the dependent communities this subsidiary law was styled *jus omnium gentium* or '*jus gentium*,' the law of all the nations which composed the Roman world.

As being the law common to those various nations, or administered equally amongst them, it was styled '*jus æquum*' or '*æquitas*.'

So much of the *jus gentium* (which was the product of

a more enlightened age than the Roman law itself) passed into the *jus prætorium* (or law created by the *prætores urbani*), that the name *æquitas* became transferred from the *jus gentium* to the *jus prætorium*.

After this incorporation of the *jus gentium* with the proper law of Rome, the latter was distinguished into two portions, the *jus gentium*, which had been incorporated with it, and the remnant of the older law, which the *jus gentium* had not superseded. This remnant was styled ***Jus civile***, the proper and peculiar law of the Roman ***civitas***.

The distinction between *jus civile* and *jus gentium* nearly tallies with that between *jus civile* and *jus prætorium*, for 1. Most of the *jus prætorium* was naturally formed upon the model which the *jus gentium* (or *jus æquum*) presented; and, 2. The incorporation of the *jus gentium* with the law of Rome was chiefly effected through the edicts of the ***Urban*** *prætors*.

For these reasons *jus gentium* and *jus prætorium* came to be considered equivalent expressions.

So the term '*æquitas*' in the same way was restricted to the *jus prætorium*, though it might have been extended to a *lex* or *senatus consultum*, which had borrowed its principles from the *jus gentium*.

As the proper Roman law absorbed the *jus gentium*, the latter gradually disappeared, as the former was applicable to the cases it had been made to meet. So the office of prætor peregrinus fell into disuse.

The later Roman law after this absorption of the jus gentium tended to universality, and was adapted to the common necessities of the entire Roman world.

[A general law, or jus gentium, nearly resembling the jus gentium in question, has prevailed in most countries. For every system which is common to a limited number of nations, or to all the members of a single nation, is a '**jus gentium**,' as opposed to the particular systems of those several nations, of the particular bodies of law prevailing in that one community.]

(2.) The *Jus Gentium*, or *Naturale*, as treated in the Institutes and Pandects.

The *jus gentium*, or *naturale*, of the Institutes and Pandects has no connection with that described above; it was imported into the Roman law from the systems of the Greek philosophers by the jurists styled classical, so called because they lived in or about the time of Augustus and the classical ages which followed.

The distinction of *jus civile* into *jus civile* and *jus gentium*, which occurs in Justinian's Institutes, is as follows:—

Every nation has a positive law and morality peculiar to itself; these may be styled the *jus civile*.

Every nation, moreover, has a positive law and morality which it shares with every other nation, *of which natural reason is the source or immediate author*, and which may be styled '*jus gentium*' or '*jus omnium gentium*.'

It is manifest from a comparison of several passages in Justinian that the *jus gentium* of Justinian's compilations is the natural or *divinum jus* of Cicero; an idea borrowed from the φυσικὸν δίκαιον, or natural rule of right of the Greek philosophers.

The following passages illustrate the subject:—

'*Quod vero naturalis ratio inter omnes homines constituit id apud omnes populos peraeque custoditur, vocaturque jus gentium, quasi quo jure omnes gentes utuntur.*'

'*Antiquius jus quod cum ipso genere humano prodítum est.*'

'*Naturale jus quod vocatur jus gentium; quod dicimi quâdam providentiâ constitutum semper firmum atque immutabile permanet.*'

The distinction of *jus civile* and *jus gentium*, according to Justinian, is more speculative than practical, and there is hardly a legal inference based on the distinction to be found in his compilations.

[There is one instance, however, of such an inference. Persons who are allowed **jus ignorare** cannot plead this ignorance if they have committed a crime against the **jus gentium**, which it is presumed should be known by a kind of moral instinct.]

The expression *jus naturale* is, however, ambiguously used even by the classical jurists. It has **two meanings**: 1. That portion of positive law which is a constituent part of all positive systems; and—

2. That standard to which all law ought to conform.

For example.—Slavery is said in some passages to exist *jure gentium* (in the first sense), and in others it is said that slavery is repugnant to the law of nature (in the second sense).

Other meanings of *Jus Gentium.*

Jus gentium is sometimes taken to include positive morality as well as positive law, especially that portion of positive morality which is known as International Law. As including all law and all morality supposed to be universal, the phrase '*jus gentium*' naturally includes that morality which exists inter gentes.

In some modern treatises almost any system of law which enters into many positive systems is styled *jus gentium*. Spelman styles the feudal law the *jus gentium* of Western Europe.

(3.) The Law of Nature, or *Jus Naturale* of Ulpian.

This *jus naturale* of Ulpian is a law common to man and beast, '*quod natura* omnia *animalia docuit.*' This *jus naturale* he opposes to the *jus gentium* (which tallies with the law natural of the moderns).

This notion is peculiar to Ulpian, and though it is set at the commencement of the Institutes, yet no attempt is made to apply it in the body of the work; so that it can scarcely be considered the natural law of the Romans.

Ulpian falls into two mistakes:—

1. He confounds the instincts of animals with laws.
2. He confounds laws with certain motives or affections, which are among the ultimate causes of laws.

LECTURE XXXII.

Law Natural and Positive.

The distinction between Law Natural and Law Positive according to modern writers may be thus stated:—

The positive laws accounted natural are those which are common to all political societies in the character of positive laws, and, being palpably useful to every society, have their counterpart in the shape of moral rules in every society, political or natural.

Laws accounted positive, as opposed to natural, are not common as positive laws to all political societies, or, if common, have not their counterpart in the moral rules of all societies (political or natural).

Current argument in favour of this view:

The universal and concurrent observance of this so-called natural law cannot be the result of induction from utility by fallible human reason, but must be due to an unerring instinct, which truly apprehends the rules of Divine law.

But there are positive rules (legal and moral, or exclusively moral) which are not universal; these may be styled positive, or merely positive, as not being inferred from Divine originals, but as being of purely human position.

The distinction, therefore, seems to rest on the supposition of a moral instinct.

[But, assuming that the principle of utility is our only guide to the Divine laws, the distinction, though not unmeaning, is

nearly useless; for every law which accords with the principle of utility must accord with the Divine law of which it is the exponent. So that all laws which are **beneficent**, whether they be **general** or **particular**, may be accounted **natural**.]

Offences against this **natural law** are styled '*mala in se*' by the modern jurists.

Offences against law **merely positive** are styled '*mala quia prohibita*.'

This distinction tallies with that of the Romans into offences *juris gentium* and *jure civili*.

The expression Natural Law has two disparate meanings:—

1. That explained above, viz. **certain rules** of human position **common** to **all** societies.
2. It also signifies the **standard** to which human rules ought to conform.

Natural Rights.

The term **natural rights** would be expected to mean the rights corresponding to natural law, but the expression is frequently taken to mean the rights and capacities which are said to be natural in the sense of **original** or **innate**, which a man has simply as being a man, or as living under the protection of the State.

For example.—The rights to reputation and to security are styled natural rights, though they could hardly exist by natural law.

Blackstone, by confounding the two disparate meanings of the term, has classed natural rights (in the sense of rights not acquired by any particular incident) with the law of persons, styling them absolute rights; whereas they belong properly to the law of things.

LECTURE XXXIII.

Different Meanings of 'Equity.'

In its **primary sense** the term '**Equity**' is synonymous with **universality**, being first applied to the *jus æquum* of the prætors. This *jus gentium* to which the term was applied being distinguished by comparative fairness, equity came to denote in a secondary sense '*impartiality*.'

Impartiality being good, 'equity' is often extended as a term of praise to any system of law which is conceived as being worthy of commendation.

The most interesting of the various objects denoted by the term Equity are those portions of Roman and English law which were established by the prætors and chancellors respectively.

> [It is unnecessary to discuss here the notion formerly current, but now exploded, that the distinction in the English sense of the terms between Law and Equity rested on necessary and universal principles.]

Before proceeding to Equity as a department of Law, it is advisable to enumerate certain senses which 'Equity' may bear when it does **not** denote a certain portion of positive law.

1. **Equity as meaning extensive (or restrictive) interpretation** *ex ratione legis.*

When the provisions of a law are extended to an omitted case, because that case falls within its reason, the law is said to be interpreted agreeably to 'equity.'

> [This must be distinguished from that genuine interpretation which takes the reason of the law as its guide to ascertain a specific doubtful intention.]

The radical idea of equity in the above instance is Universality or Uniformity.

Restrictive interpretation is that whereby the law is

not applied to a case which it actually includes, but which (looking at its purpose) its provisions should not embrace. Grotius applies the term *æquitas* to the above species of interpretation, but it is never so applied by the ancient writers. This restrictive interpretation was probably not permitted by the Roman law, and ought not to be permitted by any.

2. **Equity as meaning Judicial Impartiality.**

It often signifies the due administration of the law agreeably to its spirit and purport.

3. **Equity as meaning 'Arbitrium.'**

As defined by Cicero and others, it signifies nothing more than the arbitrary pleasure or arbitrium of the judge as determined by narrow considerations of good and evil.

A so-called equity would be entirely mischievous.

4. **Equity as meaning Standard Legislative Principles.**

In the same way that the law natural of the moderns, equity often means the standard to which it is supposed that law should conform.

In this sense equity may be styled 'the spirit of laws.'

5. **Equity as meaning 'performance of Imperfect Obligations.'**

In this sense an equitable or just man is one who, not compelled by the legal sanction, performs the obligations imposed by the moral and religious sanctions. In this sense equity is used often as a synonym for morality.

LECTURE XXXIV.

Equity as a department of Law.

Of the various portions or departments of law systems which have received the name of Equity, the most important are what may be styled—

1. *The Jus Prætorium*, in the Roman system.
2. *The Chancery Law*, in the English system.

[The use of the phrase 'Courts of Equity' is improper. In whatever of the usual senses we take the word Equity, Courts of Law and Equity are equally concerned with or strangers to Equity.]

Prætorian and Chancery law will be contrasted to show that the distinction between Law and Equity is accidental and anomalous, and also to enable us to state and examine more clearly the distinctive advantages and disadvantages of direct and judicial legislation.

1. Prætorian Equity

(a) Judicial functions of the Prætors.

In the early period of the Roman Republic the assembled Roman people were the judges in criminal cases.

[Hence the expressions Judicia publica, Delicta publica, as applied to criminal procedure and to crimes.]

The civil jurisdiction at the same time was vested in the consuls, to relieve whom the prætor was appointed, and in time this latter officer obtained all the jurisdiction formerly exercised by the consuls.

On the appointment of the second prætor or prætor peregrinus, the original *prætor* was styled *urbanus*.

The procedure before the prætor was as follows:—

The prætor *alone* heard and determined causes if—

1. The defendant confessed the facts of the plaintiff's case, and did not dispute their sufficiency in law.

2. If the contending parties, being agreed as to the facts, came to an issue of law.

3. If the defendant disputed the truth of plaintiff's statement, when the statement was supported by clear and convincing evidence.

If the parties came to an issue of fact, and the case was doubtful, the prætor put the disputed point into a *formula* or statement (generally involving a mixed question of law

and fact), and referred it to a *judex*, who gave judgment on the case. The *formula* and judgment were then remitted to the prætor, who saw the judgment executed.

[The proceedings before the prætor were said to be in jure. Those before the judex or arbiter, in judicio.]

The original proceedings before the *prætor*, viz. by *vivâ voce*, resemble what Bentham calls natural procedure. After the judicial constitution was changed the functions of the *judex* and *prætor* were both discharged by the latter, and the cases were stated on both sides in writing.

Sometimes the prætor at the outset gave provisional judgments, based on the *ex parte* statements of the plaintiff (cf. Injunctions in Chancery and Mandamus at Common Law in the English system). Against this provisional judgment the other party might show cause, and in case of doubtful fact the question was remitted to a *judex*.

Cognitio, or proceeding *extra ordinem*, was as follows:—

In certain cases the prætor acted as a judex as well as prætor, and disposed of both questions of law and fact.

By the time of Justinian this method had completely supplanted the older form, and the cognisance of the suit from beginning to end was wholly had by a single judge.

LECTURE XXXV.

(β) Legislative Functions of the Prætors.

As the manner of procedure was left in a great degree to the discretion of the prætor, he was enabled to publish on his accession to office Rules of Practice and Procedure, which he would observe during office.

Gradually the prætors proceeded to amend the *substantive* law (in the Benthamistic sense), or that law which

they were called to administer, as opposed to the adjective law of procedure, which they were empowered to make.

Edicts were of two kinds, **general** and **special**, and it was by the former that the prætors mostly introduced new law.

A General Edict was a statute made by the author as a **subordinate legislator.**

A Special Edict was an order in a specific case issued **by its author as a judge.**

['**Edict**' generally means the legislative edict when used simply. So **edicere** means to legislate directly, the act of **judging** being denoted by the expression **jus dicere** or **decernere.** In the Verrine Oration, Cicero accuses Verres of violating as judge the rules he had established as legislator: '**quod aliter atque ut edixerat decrevisset.**'

'*Interdicere*' was used of a provisional order of the prætor made on an ex-parte application.]

The prætors were accustomed to publish immediately after their accession a general edict, which was styled '*perpetual*' (as opposed to '*occasional*'). This edict obtained as law only during the year of office of its author. If a prætor simply copied the edict of his predecessor, the edict was called '*tralatitium.*'

We frequently meet with the phrase 'the edict,' which phrase is to be explained by the fact above stated.

With reference to its contents it consisted of a series of edicts, the joint work of a series of prætors, though it was promulgated by, and was the edict of, the prætor at any given time in office.

After a time the new matter introduced by each new prætor bore a very small proportion to the provisions of his predecessors.

The aggregate of rules contained in the edict for the time being constituted the '*Jus Prætorium.*' The civil law formed by the judicial decisions of the prætors might have been styled Prætorian Law, but (probably in conse-

quence of the small part played by judicial decisions in forming Roman law, owing to the facilities of legislation afforded to the prætor) the term Prætorian Law was applied exclusively to the law as contained in the general edict.

All magistrates of elevated rank possessed the power of legislation, '*jus edicendi*,' with regard to such matters as fell within their jurisdiction. And the body of rules so established was termed '*jus honorarium*.' But as the *jus prætorium* forms so important a part of it, the term *jus honorarium* is often restricted to the '*jus prætorium*.'

Materials out of which the Jus Prætorium was formed.

1. The prætors gave the force of law to moral rules which had prevailed generally among the Roman people.

2. They imported much of the '*jus gentium*' which had been adopted by the *prætores peregrini*.

3. They supplied the defects of the *jus civile* agreeably to their own ideas of utility.

Observation 1.—

Accordingly, since the prætor drew so largely upon the *jus gentium* (or *jus æquum*), and upon rules founded in utility, his system was styled 'Equity.'

From its mode of growth it naturally consisted of a mass of insulated rules, and lacked system.

Observation 2.—

The substantive law introduced by the prætor was implicated with procedure: thus, he did not give rights unknown to the *jus civile* directly, but would give an action to any one claiming such a right. In the same way he would not repeal an existing rule, but would protect a defendant who had broken it.

The actions created by the Prætorian Edict were styled

Utiles, as being given by way of analogy to actions given by the jus civile.

> [This is on the supposition that 'utilis' is derived from the adv. 'uti.'
>
> But if **utilis** have its ordinary meaning, the actions would be so termed because of their being **available** for the prosecution of rights.]

They are also called '*actions in factum*,' because the plaintiff merely stated his facts without referring to the law entitling him to relief, as would have been done in an action *jure civili*.

Under the Commonwealth the prætors exercised their powers by the authority of the Roman people; after the dissolution of popular government, by the authority of the princes or emperors.

In the reign of Hadrian the edict was amended by the lawyer Julian, and published as a body of rules *immediately* proceeding from the sovereign, the edict thus becoming Written Law in the judicial sense.

It was also styled *perpetuum* or *continual*, as being calculated to last in perpetuum or until abrogated by competent authority.

It is uncertain whether the prætors ever again legislated directly. It is certain that after the third century they had lost the power of so doing. From the time of Alexander Severus to Justinian the sources of law administered by the tribunals were the constitutions of the Emperors and the writings of the accredited lawyers.

Effect of the Prætorian Edict on the arrangement of the Code and Pandects.

The Code is composed partly of edictal or general constitutions (statutes) published by the Roman Emperors as sovereign legislators, and partly of special

constitutions published by them as sovereign administrators.

The Pandects consist almost entirely of excerpts from the writings of the jurists regarding general principles or specific cases of law. As being adopted by Justinian, these are properly statutes and judicial decisions.

The order or arrangement of the Code and Pandects is copied from Hadrian's perpetual edict. The probable reasons were—

1. The order of the prætorian edict was the only one known for the arrangement of the compilations projected by Justinian.

[The method of Gaius (which was servilely copied in the Institutes) had only been used by the Institutional writers.]

2. Many of the writings of the jurists whose opinions were authoritative, were in the form of running comments or glosses on the perpetual edict. This arrangement had the single merit of being familiar to the practising lawyers.

Some modern writers suppose that the direct legislative power exercised by the prætors was usurped and introduced *per artes*.

But the fictions used by the prætors were open and palpable, and were employed—

1. Through respect for the laws, which they virtually changed.

2. Through a wish to conciliate the lovers of things ancient.

That the legislative power of the prætors was not usurped or assumed covertly appears from the facts, that—

1. The law made by the prætors was made and published under the eyes of the people, and with the approbation of the tribunes of the plebs, who could by their '*veto*' have forced its authors to recall it. Moreover, it was sanctioned by the direct authority of the people,

for numerous '*leges*' assume that the *jus prætorium* is part of the law of Rome.

In most countries, through the comparative incapacity of the sovereign legislature, the main work of legislation has been done by subordinate judges, otherwise it would not have been done at all. At Rome, especially, did this hold good, for legislatures (such as the populus and plebs of Rome), consisting of numerous bodies, have peculiar incapacities, which obviously are increased in proportion to the number to be convened; and, on the other hand, the jus prætorium was peculiarly acceptable, being clear and concise statute-law (although judge-made), really serving as a guide of conduct.

[The business of legislation should be entrusted to persons versed in jurisprudence and legislation as well as the particular system of the given community, the sovereign legislature merely authorising and checking, but not legislating. Certain German jurists, haters of codes and admirers of customary law, inconsistently praise the Roman law, not perceiving that its excellencies belong to it as being a faint approach to a code, and that they belong in a higher degree to a well-made code.]

LECTURE XXXVI.

Jus Prætorium and English Equity compared.

The distinction between law and equity (in the English or technical sense is accidental and *historical*, being confined to the Roman and English law; though in other particular systems there is equity in the various senses of judicial impartiality, impartial maxims of legislation, the *arbitrium* of the judge, the parity or analogy which is the ground of so-called interpretation *ex ratione legis*.

[The origin of the Courts of Equity in England may be traced to the inadequacy or unwillingness of the Courts of Law to provide for giving relief in certain classes of cases. For

instance, if the Courts of Law had given the power of interrogating the defendant, and had enforced certain trusts, the equitable jurisdiction of the chancellor would hardly have arisen.]

Differences between Roman and English Equity.

1. **Prætorian Equity** was administered by the **ordinary** civil tribunals; **English Equity** by an exceptional **or extraordinary** tribunal.

2. The **Prætorian Equity** was **Statute Law**, *i.e.* published in a general or abstract form. Whereas, **Chancery Law** is for the most part **judiciary** law.

3. The subjects with which Prætorian Equity and English Equity are conversant are widely different.

(*α*) **The prætors altered the whole law of intestate succession**, and the law on the subject as found in the Code and Novels is entirely based on their equity.

They also limited the power of testamentary bequest.

The English courts, on the other hand, adhere to the rule '*Æquitas sequitur legem*,' and have never meddled with the subject of succession or of testamentary disposition.

(*β*) **The enforcement of trusts** (which are of the essence of all law whatever) is one of the main features of English Chancery Jurisdiction.

The prætors, on the other hand, did not enforce *fideicommissa*, which were equivalent to trusts in the English law; they were first enforced by the Emperors.

The resemblances between Roman and English Equity are two:—

1. They are both *unsystematic* in form, and were introduced by gradual innovations.

2. They are both the results of attempts to correct or supply the deficiencies of an existing law-system which is superseded, while in appearance it still continues to exist.

LECTURE XXXVII.

Statute and Judiciary Law.

By Statute Law is meant any law which is made in the mode of direct or proper legislation (whether its *source* be the sovereign or a subordinate).

By Judiciary Law is meant law which is made in the mode of indirect, judicial or improper legislation (whether its *source* be the sovereign or a subordinate).

Again,

A Statute Law is made solely and professedly **as a law or rule,** and is intended as a rule of conduct, **and** therefore to guide the tribunals in their decisions upon classes of cases.

It is expressed in **general** or **abstract** terms.

A law made judicially is made for the decision of some specific case, and its **direct** purpose is **not** the establishment of a rule.

It does **not exist in general or abstract terms.**

The reasons for each decision must be gathered from a careful observation of the facts with which they are implicated, and from them the ground or principle of decision must be abstracted, which will apply universally to cases of a class and will serve as a rule of conduct.

[Through a disregard of these differences between statute and judiciary law the framers of the **Code** and **Pandects** of Justinian have made those works very faulty as a code.

For—

Each of these compilations consists partly of **statute** and partly of **judiciary** law.

Now, the **primary** index to the intention of a statute is the **grammatical** and **literal** meaning of the words in which

it is expressed. But the primary index to the meaning of a judicial decision is not the grammatical and literal meaning of the words in which it is expressed. The terms used must be interpreted by the nature of the case under consideration.

A large portion of the Code and Pandects consists of judicial decisions, or of opinions which, owing to the sanction of their imperial compiler, have the force of judicial decisions: but the facts of the cases are often suppressed, so that the general propositions contained in the special constitutions are detached from the facts which are the requisite guide to their exact import; consequently, before we can collect the import of the general principle or rule, we must supply the residue of the specific case from the remaining fragments.]

The *ratio decidendi*, or rule of judiciary law ascertained by the process of abstraction and induction from the decision or decisions in which it is contained, must be distinguished from the—

Ratio legis, or the end and purpose which moves the legislator to make a statute law.

The *ratio legis* is neither a law nor the *primary* guide to the interpretation of a statute, although in some cases it may be an *aid* to interpretation.

Summary of the Above.

A Statute Law is expressed in general or abstract terms, which are parcel of the law itself.

And, consequently, the proper end of interpretation is the discovery of the meaning attached by the legislator to those expressions.

But a rule of judiciary law exists nowhere in expressions which are parcel of the *ratio decidendi*. The terms employed by the judicial legislator are merely faint traces from which the principle may be conjectured, and not a

guide to be followed inflexibly, in case their meaning is certain.

The two processes above referred to, namely, the interpretation of statute law and the induction by which a rule is extracted from a judicial decision or decisions, have been confused by most of the modern civilians, for these have applied the same rules of interpretation to the *statute* as to the *judiciary* law of Justinian's compilations.

For example.—

1. They have confounded extensive interpretation of statute law with the application of a decided case to a resembling case.

Whereas, the former is truly an extension of the law to meet a case which its provisions do not comprise. The latter, on the other hand, is the direct application of the judiciary law itself, and not the extension of that law agreeably to its reason and scope.

Again, the common rule of interpretation, '*Cessante ratione legis, cessat lex ipsa*,' applies solely to *precedents*.

For statute law may exist as such, though its reason may have fallen away; and the judge should not take it upon himself to set it aside, though he may think it desirable that it should be altered.

[The '**competition of opposite analogies**,' according to Paley, is the source of most legal controversies.

It cannot apply to the discovery of a rule of judiciary law by induction (as above explained), for if inferred from a single case, it cannot be founded on opposite analogies; and if inferred from more than one, it was founded on their resembling and not on their differing properties.

But probably Paley refers to the application of the rule to the case awaiting solution. This case may in some respects resemble the subject case of the rule proposed to be applied, and in others it may resemble another case forming the subject of a different rule. These are competing analogies, but are not peculiar to judicial law.]

Blackstone says of the decretes of the Roman Emperors that, '*contrary to all true forms of reasoning, they argue from particulars to generals.*'

An imperial decrete, such as that to which Blackstone alludes, is a judicial decision establishing a new principle; and the application of the new principle to the case in which it is established is the decision of a *particular* by a *general*, not *vice versâ*.

According to the fiction of the English law that the law is an existing something which is only *declared* by the judges, it follows that there can be no *ex post facto* legislation in English judiciary law. So Blackstone was prevented from seeing that the application of a new principle, as described above, is really an *ex post facto* law, with regard to the case wherein it is established.

The order in which law is naturally generated seems to be as follows:—

1. Rules of positive morality.
2. The adoption and enforcement of these rules by the tribunals.
3. The addition of other rules drawn from the former by consequence or analogy.
4. The introduction of new rules by the judge's arbitrium, and illations from these.
5. Legislation proper by the sovereign legislature in the same order.
6. The action and re-action of judicial legislation and legislation proper.
7. And lastly: A code or systematic, complete, and exclusive body of law.

[The conception of a code is essentially a modern thought. Justinian intended his compilations to be a code, but no sooner were they issued than they had to be supplemented by the Novels.]

LECTURE XXXVIII.

Groundless Objections to Judiciary Law considered.

1. Bentham's—

His argument is that Judiciary Law is not law properly so called, consisting at the most of quasi commands.

But when it is known to the subjects that the will of the sovereign is that the principles or grounds of judicial decisions should be observed by the subjects as rules to be enforced by sanctions, the intimation of the sovereign will must be considered as complete.

2. It is objected that where subordinate judges have the power of making laws the community has little control over those who make the laws.

This is not an objection to judiciary law, but to law (whether made in the judiciary or legislative manner) established by irresponsible authors, though the objection would apply less to statute law, which, being expressed in an abstract or general form, manifests its scope and purpose; and if these be pernicious, its author cannot escape censure. In the case of judiciary law the author can with more ease disavow any purpose which has excited hostile criticism.

3. It is objected that judicial legislators legislate arbitrarily, and that therefore the body of the law is varying and uncertain.

(a) With respect to Supreme Judicial legislation, this may be to a certain extent true, for the sovereign is only controlled by the moral sentiments of the community. But the objection is equally valid as against supreme legislation in the form of *statute* law.

(b) With respect to legislation by subordinates.

To the judiciary mode the objection hardly applies, for the arbitrium of the judge is controlled by the sovereign legislature, by public opinion, and by courts of appeal.

Admitting that the objection will apply to judiciary law made by subordinate judges, it will also apply to statute law made by subordinate authors.

[An important influence, controlling the arbitrium of the judges, is that of the Bar. Private lawyers, whose minds are constantly occupied with legal rules, are alone able to evolve the numerous consequences which these rules imply; while only the more general of those rules can be grasped by the unprofessional public.]

LECTURE XXXIX.

PART I.

Disadvantages of Judicial Legislation.

1. Judiciary Law is difficult to ascertain.—To the bulk of the community it is unknown and unknowable. To the mass of the lawyers only imperfectly known.

This arises (1) from the enormous bulk of judiciary law, which is an obvious consequence of its form, every rule being implicated with the peculiarities of the case or cases by the decision or decisions wherever the law was established.

And (2) from the difficulty of extracting the law from the particular decisions by ascertaining the *ratio decidendi* which really constitutes the rule.

This objection is applicable to statute law when badly made, but the evil is inherent in judiciary law, however made.

2. Judiciary Law is usually made in haste, in the hurry of judicial business.

But it may sometimes be made as deliberately as statute law; for instance, the judgments of our Courts of Ultimate Appeal, where the judgment is settled in writing before it is published, as the joint judgment of the court.

3. In relation to the decided case by which a rule of Judiciary Law is introduced, it is ex post facto law.

With the exception of the case where decisions of the courts are anticipated by the practice of private lawyers, but the limitation is insignificant.

4. There is no certain test of the validity of Judiciary Law.

By what standard are we to judge the goodness or badness of a rule of judiciary law; how are we to know that it will be followed by future judges in similar cases?

Is the **number of decisions,** the '*elegantia*' of the rule, or the reputation of the judge to be the test? In short, we can never be certain as to the goodness or badness of judiciary law.

This uncertainty is not of the essence of statute law, which, if well constructed, is absolutely certain.

[An objection is made that judiciary law is not attested by authoritative documents, but resides in the memory of the judges or in fallible records. But it is clear that there is no reason why this evil should exist; and the objection applies also to statute law, which is not necessarily written or published authentically.]

5. The rules of Judiciary Law are not comprehensive.

The *ratio decidendi* being implicated with the peculiarities of the decided case is almost necessarily confined to such future cases as closely resemble the case actually decided.

Consequently, when a decision is expressed to be based on a principle laid down more broadly than the

facts required, it is often found necessary subsequently to narrow the rule apparently laid down in the first decision.

6. **The Statute Law co-existent with Judiciary Law is necessarily imperfect, bulky, and unsystematic.**

Statute law may, though little of the law is of the judiciary type, possess these disadvantages (for example, the Prussian code); but it is a necessary evil in the case of statute law, being '*stuck patchwise on a ground-work of judiciary law.*' The judiciary law in this case must have the faults above mentioned.

PART II.

Codification discussed in the Abstract.

The question is briefly this:—

Is a good and complete code better than a body of law well expressed in its way, consisting in whole or in part of judiciary law?

That codification is practicable appears from the consideration that it is possible to extract *rationes decidendi* from particular decisions (for otherwise judiciary law would not be law at all, but a mass of decisions resting on the arbitrium of the judge), and these, if stated in the abstract, would be clearer than when implicated with the facts of particular cases. The induction previous to the application of the *ratio decidendi* of a decided case is *pro tanto* codification of judiciary law.

That codification is expedient appears from a reconsideration of the evils inherent in judiciary law.

[Before considering certain impertinent arguments adduced in favour of and against codification, it would be advisable to call to mind the fact, that codification involves a change not in the matter, but the form of law.]

1. First leading objection to codification.

The necessary incompleteness of a code.

It is said that individual cases which may arise in fact or practice are infinite, and that, therefore, they cannot be anticipated and provided for by a body of general rules.

Answer.—The objection is applicable to all law, and especially to judiciary law, which is either a body of a finite number of rules, in which case it is perfectly impossible that it should provide for the infinite number of cases occurring in practice; or a mass of particular decisions inapplicable to the decision of future cases, in which case it is not law at all.

2. Hugo's objection.—A code would be liable to engender '*competing analogies*' in consequence of the number of its provisions, which no judge could know in their entirety. In consequence of this the conflicting analogies presented by undecided cases would be in exact proportion to the number and minuteness of the provisions of the code.

Answers to this objection.—It proceeds on the supposition that a code must provide for every possible case. To the first part of the objection the answer is that the future case must either be left to the arbitrium of a judge or be provided for by a law, and the incompleteness of statute law is not obviated by making no law.

The second part of the objection is that the rules of a code are more minute and numerous than those of a system of judiciary law, and that they are therefore more likely to conflict; but statute laws may be made more comprehensive than judiciary rules, which are usually narrow.

3. Third objection,—The alleged failure of the French and Prussian codes.

Answer.—These failures have been due to the faulty construction of the codes.

(*a*) **The French code—**

1. Is totally devoid of definitions of the technical

terms and explanations of the leading principles of French law; so that the code does not even furnish the necessary guides to its own meaning.

2. The authors of the French code display a monstrous ignorance of the principles of Roman law; for example, they had no clear conception of the distinction between dominion and *obligationes* (in the sense of *jura in rem* and *jura in personam* respectively) as used by the classical jurists. So they speak of '*obligation*' as that which imparts the '*dominium*,' whereas *obligatio*, in the sense of the Roman lawyers, is always contrasted with and excludes *dominium*.

The Prussian code also is devoid of definitions. It borrows the technical language of the Roman law, and does not give the requisite explanation of that language.

Again, the French code was never expected by its compilers to supersede all other law, but was meant to be eked out by various '*subsidia*,' such as (1) Natural Equity, (2) the Roman Law, (3) the Ancient Customs, (4) Usage, General Principles, &c.

The so-called Prussian code, in the same manner, was intended merely to codify the subsidiary common law existing in Germany, which was only resorted to in cases for which the local law of the various States did not provide.

Again,

The French code was constructed with extreme haste; the original *projet* being drawn up in four months, and being afterwards discussed article by article by the Council of State, a body of whom very many were not even lawyers.

There are no provisions in the French and Prussian codes for keeping down the growth of judiciary and supplemental law by working them into the code from time to time. An endless quantity of judiciary law has

been introduced in France, but has never been worked into the code. So in Prussia the Novels or new constitutions of the Law Commission, to which all doubtful questions of law are referred, exist in a separate state; but there is no attempt to amend the code in pursuance of them.

The failure of the Prussian and French codes has been greatly exaggerated: they have at least reduced the bulk of the old law and cleared it of many of its inconsistencies; and also they have diminished the amount of litigation arising from doubt as to the law.

Savigny's objection to Codification examined.—Savigny, after admitting that unity of conception is attainable in a code (arguing from the qualities of the so-called Pandect Law in Germany), gives some arguments against codification.

1. That no determinate leading principles will be consistently followed by the framers of a code, and that, therefore, its provisions must be incoherent and defective.

Savigny's own admission, as stated above, refutes this objection.

2. He argues that in an age capable of producing a good code, no code would be necessary, the want being supplied by private expositors.

Answer.—Such expositions might be as well constructed as the code; but as they would lack authority, they would also lack *certainty*, the judges not being obliged to follow them, as not expressing the will of the sovereign.

Again, Savigny objects that a code, by making the defects of the law more obvious, would encourage knaves to take advantage of those defects.

Answer.—Probably this evil is greater still in the case of uncodified law.

Codification in the Concrete.

The question whether codification in any particular society at a given time is expedient admits of no doubt, provided the code which supersedes the system of judiciary law, or of judiciary and statute law mixed, be a *good* one.

And this depends upon whether there can be found men sufficiently able to perform the task of codification, which is one of vast difficulty, though not impossible.

An advantage not generally considered would flow from codification. If the law were more simple and scientific, and if the drudgery at details which now faces every lawyer at the outset were removed, the tone of the legal profession would be raised, and we should reap incomparably better legislation and a better administration of justice than at present we possess.

PART III.—LAW CONSIDERED IN RELATION TO ITS PURPOSES AND TO THE SUBJECTS WITH WHICH IT IS CONVERSANT.

LECTURE XL.

Law of Things and the Law of Persons or Status.

This is the first great distinction of law considered with reference to its purposes and subjects.

These branches of law may be distinguished as follows:—

There are various **rights, duties,** and **capacities** by which **persons** are determined to various classes; these constitute the **condition** or *status* with which the person is invested, and are the appropriate matter of the department of law named The **Law of Persons.**

The Law of Persons, or Law of Status, as it would more accurately be styled, **regards men as bearing or invested with status or condition.**

The department of law styled the Law of Things is so called for the reason that '*Res*' includes the whole matter of which law is conversant; and a department of it having obtained the title of Law of Persons, the opposed portion received the title of the Law of Things.

Summary.

The Law of Persons is that part of the law which relates to condition or *status*.

The Law of Things is the *Corpus Juris* minus the law of status or condition.

What constitutes *Status* or Condition?

The rights, duties, capacities, or incapacities which determine a person to a given class constitute his status.

The distinction between *status* and any other rights, duties, &c., is not susceptible of any strict definition. There is no generic character common to all conditions, but they bear the following marks:—

1. The condition resides in the individual as belonging to a class, and not as an individual.

2. The rights, duties, capacities, and incapacities composing the *status* regard specially persons of that class.

3. The class must be such as from its nature cannot include all or nearly all persons.

4. The rights, duties, &c., are such as to influence the social relations of the individual.

[5. A person has little or no control over the circumstances which determine him to the class, and still less has his consent any effect upon his rights and obligations when once fixed as a member.]

The main advantages to be derived from the distinction of Law of Persons and Law of Things are:—

1. Brevity is attained by all that can be affirmed of rights and duties generally, being stated once for all in a detached form from everything relating to those rights and duties as regarding certain particular classes of persons.

2. The portions of law specially affecting peculiar classes are rendered more accessible and cognoscible. This plan of collecting under separate heads the portions of law peculiar to particular classes is strongly recommended by Bentham.

There are two other possible divisions of the corpus juris.

1. Rejecting the class '*Jus rerum*:' the body of law might be divided into special codes, appropriate to peculiar classes of persons.

The evil of this would be that each of the special codes would have to contain the matter common to all plus the matter specially referring to the peculiar class.

2. Rejecting the *jus personarum*, the sets of special provisions relating to special classes (not collected under appropriate chapters) might be appended to the more general provisions they are to modify and control.

By this plan the peculiar law of every class would be scattered throughout the code, and consequently inaccessible to members of the individual classes.

The division into *jus rerum* and *jus personarum* is preferable to both the above divisions, as it enables all classes to find the law relating to themselves, while it gives in a connected form the principles of law which are common to all classes.

The distinction, however, has not been consistently followed by its authors.

For instance, the question arises whether the jus personarum of the Roman lawyers was the law of *status*, or merely a description of the facts and events by which *status* is invested or divested.

Summary of Above.

1. The rights constituting *status* regard a comparatively narrow section of the community, and it is convenient to have them together for the benefit of that section.

2. They can be conveniently detached from the bulk of the system without breaking the continuity of the exposition, which thus gains in clearness and compactness.

LECTURE XLI.

Erroneous Definitions of *Status* examined.

1. That of the civilians, that *Status* was an '*occult quality*.' 'Status est qualitas cujus ratione homines diverso jure utuntur.' In other words, the status is considered as a quality inhering in the given person, giving rise to rights, duties, and capacities. But this *qualitas* will not distinguish a *status* or condition from any other set or collection of rights and duties.

[The rights and duties which constitute status are of two kinds:—

1. Those arising from the fact or event investitive of the condition.

2. Those which arise from that fact or event, coupled with another and a subordinate fact or event.

The former class are known as rights 'ex statu immediatè,' the latter as 'ex statu mediatè.' Rights ex statu immediatè are closely analogous with the 'absolute rights' of Blackstone.]

2. Second erroneous definition of *Status*.—Bentham's—'*consequences of the same investitive fact*.'

This definition assumes: 1. That a *status* is a set or collection of various rights and duties; and, 2, that these are the legal effects or consequences of one investitive fact, or of one 'causa' (in the sense used by the Roman lawyers).

Objections to this definition—

1. These properties will not distinguish status from other rights and duties which are matter for the law of things;

For, firstly, they belong to each of the aggregates of rights termed *universitates juris*; and, secondly, they are not even peculiar to *universitates juris*, but are found

in most rights and duties termed **particular or singular**, *e.g.* in the right of dominion in a specific thing.

3. Third erroneous definition of 'Status.'

'*Status is constituted by the divisibility of the collection of rights and duties into those arising* **immediately** *from the title which engenders the aggregate and those arising* **mediately** *from that title through special titles.*'

Objection—

Not all aggregates of rights, &c., deemed conditions are divisible in this manner, and many not considered conditions are so divisible; *e.g.* (*α*) the right of the owner of a field to walk over it arises from the paramount title, and (*β*) the right of the owner to prosecute a trespasser arises from the investitive fact whereby he obtained the dominium and the special title of the injury against the paramount right.

4. Fourth erroneous definition of 'Status.'

'*Status is constituted by* **jus in rem** *in the complexion or aggregate of rights.*'

Objections—

1. In purely onerous conditions the mark is not found.
2. The mark is found in universitates juris not deemed conditions, *e.g. hereditas.*
3. And in sets of rights deemed **singular** or particular, *e.g.* dominium.

LECTURE XLII.

Fifth Erroneous Definition of 'Status.'

That of **Thibaut.** '*Status is a capacity or ability to take or acquire a right, and to incur a duty.*'

Objections to this definition—

1. There are capacities common to *all* members of

political societies. As there must, therefore, be capacities which are not conditions, the term 'capacity' will not *characterize* 'condition,' which regards specially persons of a given class.

2. There are conditions (*e.g.* that of the slave) which consist mainly of incapacities.

3. When the rights and duties arising from the *status* can be divided into those arising immediately and those arising mediately from the *status*, the former, it is clear, are rights and duties, and not capacities. Whenever the constituents of status are so divisible, the *status* is an aggregate of rights and duties with capacities.

The '*Tria Capita*' of the Roman Lawyers.

There were three pre-eminent *status* which received the name of '*capita*' from the Roman lawyers.

They were: 1. The *Status libertatis*, or condition of the freeman (as opposed to that of the slave).

2. The *Status civitatis*, or condition of the Roman citizen as opposed to that of the foreigner.

3. The *Status familiæ*, or condition of being a member of a given family, and as such enjoying certain rights and capacities.

A definition of *caput* is given by the German civilians resembling that of *status*, above given, *i.e.* that a *caput* is a condition precedent to the acquisition of rights, *i.e.* it comprises capacities. But *caput* includes rights and duties arising from the *status* immediately, as well as capacities to take rights and incur duties.

The Romans did not limit the term Status to the three 'capita,' for they speak of the *status* of a slave who had no *caput* at all.

LECTURE XLIII.

The Roman lawyers in their works do not conceive the purpose of the division into jura personarum and jura rerum, consequently in some cases they inserted in the law of persons only the events engendering and destroying the status in some cases, while in others they also inserted the rights and duties constituting the status.

The division of Roman Law into *Jus Publicum* and *Jus Privatum*, and again, of *Jus Privatum* into *Jus rerum*, *jus personarum*, and *jus actionum*, involves a logical blunder.

The '*generalia*' of the *jus actionum* should be placed under the '*jus rerum*,' while the parts relating to special classes should be placed under the heads of the *jus personarum* to which they belong.

Blackstone divides the *Corpus Juris* into law regarding rights and law regarding wrongs: this is a cross division, for the law regarding wrongs also regards rights arising out of wrongs.

The law of things should precede the law of persons in the Corpus Juris, for the latter consists mainly of narrower positions and rules modifying the law of things.

Blackstone divides the Rights of persons into Relative and Absolute, meaning by absolute rights those arising **sine speciali titulo,** residing in a person simply as being a member of a state, *e.g.* the right to reputation.

Objections to this division—

1. Blackstone speaks of absolute and relative rights, but **all rights are relative,** *i.e.* suppose duties incumbent on others.

2. He defines absolute rights as those appertaining to individuals as such. But all rights must belong to particular persons as particular persons.

3. He further defines them as rights which would belong to persons in a state of nature.

But legal rights can only refer to men as members of a given society.

4. Blackstone makes a further error in classing absolute rights of persons under the law of persons. As regarding all persons these rights are matter for the law of things.

LECTURE XLIV.

Law, Public and Private

1. Public Law strictly is the law of political conditions, and as such is properly a department of the law of persons.

[Two difficulties present themselves:—

1. An account of public law in this sense would include such portions of public law as relate to the sovereign, and these really are positive morality.

2. Political and private conditions are with difficulty distinguished.]

The above arrangement is suggested by Hale, and is to be recommended on the grounds of promoting convenience of reference and general coherence of the legal system. The opposition of public to private law involves a misconception as to the real end of the law, which is in a certain sense both public and private throughout all its provisions concerning the public and each member of the public.

2. Public Law in its vague and less definite meaning is the law of political conditions and of crimes (with that of criminal procedure).

This was the arrangement of the Roman jurists. Now the law of political conditions *does* peculiarly affect the whole community, but crimes acquired the title of '*public*

wrongs' through the accident that crimes were tried originally by the sovereign Roman people.

It is clear that the distinction between crimes and civil injuries, or between public and private wrongs, rests upon the difference in the ways in which they are pursued, the former being remedied at the instance of the state, the latter at the instance of individuals.

So Hale does not style crimes public wrongs, but '*pleas of the crown.*'

[Some Continental jurists go so far as to include International Law under the head of Public Law, forgetting that it is a branch of positive morality.]

Other meanings of Public Law:

Public Law also is taken to mean—

1. **Law made by the supreme legislature,** or by subordinate political superiors, as opposed to that made by private persons in pursuance of legal rights.

2. **Laws other than those creating** '*privilegia*,' and **styled** '*jus commune*' as opposed to '*jus singulare.*'

3. Under '*public law*' are sometimes classed **definite and obligatory modes of performing certain transactions,** *e.g.* '*Testamenti factio . . . . publici juris non est.*'

4. **Laws prohibiting or absolutely binding,** as opposed to laws dispositive or provisional. The latter class consists of laws which determine the effect of a transaction in case the parties do not otherwise provide, *e.g.* the French law of marriage.

[The epithet 'civil' is used of law in the varied senses of 'not-ecclesiastical,' 'not-criminal,' 'not-military,' and even 'not public.']

LECTURE XLV.

The matter of the Law of Things may be divided into—

1. **Primary rights with primary relative duties,** *i.e.* those which do not arise from delicts.

2. **Sanctioning (or secondary) rights and duties,** which are consequences of delicts. **(Their proper purpose is to prevent delicts.)**

In the language of Bentham the law of primary rights and duties would be called **substantive,** and that of sanctioning rights and duties **adjective** law. **But this nomenclature,** by implying that the divison is between **rights** existing per se, and those existing merely to **protect** other rights, leads to misconception; for many **primary** rights, as well as secondary rights, exist for the **protection** of other rights. This division into primary and **sanctioning** rights is not founded on a difference in the purposes for which the rights and duties are respectively given. **The** true principle of division seems to rest on a **difference** between the events from which the rights and **duties arise.**

The division given above includes procedure, civil and criminal, under the head of sanctioning rights and duties.

* [Bentham includes droit-civil and droit-pénal in **droit-substantif,** including under droit-pénal the law relating to civil injuries and crimes with their punishments. But all **rights of action** growing out of a civil injury are **adjective law**; and further, if the law of procedure be called droit-adjectif, it ought to include the law relating to rights and duties arising from civil injuries and from crimes and punishments.]

Distinction between an action considered as a right and an action considered as an instrument for enforcing that right.

Though the scope or purpose of the right of action is distinct from the procedure resorted to in enforcing the

* Vide Table IX.

right, yet it is impossible to extricate the right of action from the subsidiary rights by which it is enforced.

[**Every right of action arises from an injury**, the only exception being where a right of action is given on account of want of wrongful consciousness on part of defendant.]

In most law systems primary rights are not separated from the secondary, *i.e.* the law conferring the primary right is contained by implication in the law which gives the remedy.

E.g. duties owed to the State are generally to be implied from the description of their violations.

The Institutes follow an illogical division.

Obligations *ex contractu* (which are **primary** rights) are opposed to **obligations** *ex delicto* (which are **secondary**), and arise from violations of rights in rem. The obligations arising from the breach of obligations *ex contractu* are therefore attached to obligations *ex contractu*; and if the logical arrangement were followed breaches of rights *in rem* would be similarly considered with rights *in rem* themselves.

Blackstone is more logical, for he treats of obligations arising from contract as **primary**, and those arising from a violation of them he classes with **wrongs**.

LECTURE XLVI.

Primary Rights.

Primary Rights, the first of the two great divisions of the subject matter of the Law of Things, have already (Lecture XIV.) been distinguished into *jura in rem* and *jura in personam*. They may now be subdivided into—

1. **Rights** *in rem* **as existing** *per se*, **or as not combined with rights** *in personam*.

2. Rights *in personam* as existing *per se*, or as not combined with rights *in rem*.

3. Simple particular combinations of rights *in rem* and rights *in personam*.

4. Such universities of rights and duties as arise by universal succession.

The Roman jurists divided the matter of the law of things into:

1. *Dominia or Jura in Rem.*

2. *Obligationes, or Jura in Personam*, and subdivided *dominia* into (α) *dominium rei singulæ*, (β) *jura in re alienâ*, (γ) *universitates juris*. The objection to this division is that *universitates juris* include rights *in personam* as well as *rights in rem*.

LECTURE XLVII.

Rights in rem as existing per se considered with reference to the difference between their subjects.

1. Rights *in rem*, of which the subjects are things and the objects forbearances with regard to determinate things (*e.g.* property in a house).

2. Rights *in rem*, of which the subjects are persons and the objects forbearances with regard to determinate persons (*e.g.* a monopoly).

3. Rights in rem without specific subjects, and the objects forbearances, having no specific regard to specific things or persons (*e.g.* a man's right to his good name).

Those rights *in rem*, of which the subjects are persons, are nearly all matter for the law of persons or *status*.

Rights *in rem* over things.

1. When by virtue of the rights the person entitled can deal with the subjects to an extent which is indefinite,

and not circumscribed (though not unlimited), the right may be styled *dominium* or *property*, as—

2. When the person entitled can only use the subjects to an extent (in one direction) exactly circumscribed, the right may be called *servitus*.

[Various meanings attached to the word property or dominium :—

1. Its strict sense, a right indefinite in point of user, unrestricted in point of disposition, and not restricted by rights of others whose enjoyment is postponed.

2. A right indefinite in point of user, but limited by regard to rights of persons entitled in remainder or reversion (*e.g.* a life interest in land).

3. The right of **property** is opposed to the right of **possession**, and in this sense it includes **servitus**.

4. According to the Roman jurists it is either—

(1.) A right indefinite in point of user over a thing;

Or (2) jus in rem, or all rights not included under **obligationes**.

5. In English law we speak only of **property** in **moveables**.

6. The term property is applied to some rights over persons (*e.g.* that of the master over the slave), but not to others (as the right of the father over the son).

7. The aggregate of a man's faculties, rights, &c., or his **assets**. It includes in this sense all kinds of rights.

8. **Legal rights of any kind** (as when it is said that the object of government is the protection of property).]

LECTURE XLVIII.

Dominium as opposed to Servitus.

Property or dominium gives to the entitled party the power of applying the subject to all purposes, except such as are inconsistent with his relative or absolute duties.

Servitus gives the power of applying the subject to exactly determined purposes.

Property is susceptible of various modes, *i.e.* the limitations of the power of user may vary infinitely, according to the intention of the State in granting the right: but though the modes are infinite, and though the indefinite power of user is always more or less restricted, there is in every system of law some one mode of property in which the restrictions are fewer than in others. And to this mode pre-eminently is the term property or *dominium* generally applied.

For example.—In English law Absolute property in a moveable.
In French law, *Propriété.*
In the Roman law, *Dominium*, in the strict sense.

But even this mode of property is not unlimited in respect to the right of user, which must be such as shall be consistent with the rights of others generally, and the duties incumbent on the owner.

Property in this its largest sense, or in any other modification of it, cannot, therefore, be exactly defined, importing as it does an indefinite power of user.

The definition of property would necessitate that of every right and duty contained in the Corpus Juris.

But modes of property are distinguishable from one another precisely; for instance, the right of a limited owner may be distinguished from that of the absolute owner by an enumeration of the powers of user, from which the former is excluded.

[So in the Institutes of Gaius and Justinian, **dominium** is not defined at all, but the nature of the right is left to be inferred from the treatise generally.

In the 544 art. of the French Code propriété is defined as the absolute right of dealing with a thing as we will, provided we do not use it in any manner prohibited by the law.

Such maxims as 'Sic utere tuo ut alienum non lædas,' 'Qui jure suo utitur neminem lædit,' arise from the impossibility of exactly defining the right of property, and are really identical propositions.]

LECTURE XLIX.

Servitus as distinguished from *Dominium*.

Preliminary observations.

1. **A right of servitude is a fraction of a right of property residing in another.**

So rights of servitude are styled by the Roman lawyers jura in re aliena, or rights over subjects, of which the property resides in another.

Savigny defines servitude as '*a single or particular* **exception** *(accruing to the benefit of the party in whom the right resides) from the general power of user and exclusion residing in the owner of the thing.*'

> [But a right in the nature of a servitude may exist over a thing, which, properly speaking, has no owner.
>
> *E.g.* a sovereign reserves to himself a portion of territory, and grants to a subject a right corresponding to a servitude. But the sovereign cannot be an **owner** in the proper sense, not being able to possess **legal** rights.]

2. **Property** will here be taken to mean any right in rem which **gives an indefinite power of user, and Servitude** a right in a subject owned by another, giving to the party **a definite power of using it.**

> [There are modes of property to which that name is not usually applied, and there are servitudes, so called in the Roman law, which are styled rights of property in the English law.
>
> The term '**easement**,' though never applied to a right in rem which may be styled property, is often not applied to rights in rem which are properly styled servitudes.]

3. **Rights of Servitude** will be assumed to be rights of **using a subject owned by another.** But negative servitudes consist **non faciendo,** *i.e.* in a right to a **forbearance**

on the part of the owner from putting the subject to a given use.

Servitudes.

1. Distinction between Affirmative (or Positive) and Negative Servitudes.

Property or *dominium* consists of indefinite powers of user and exclusion, which correspond to forbearances on the part of others generally. Frequently these powers are restricted by rights of a determinate person over the same thing, and when that person has a right (or *jus in rem*) as against the owner and the rest of the world to put the subject to uses of a definite class, the person has a right called a Servitude; so also, when the person has a right to a forbearance on the part of the owner and the rest of the world from putting the subject to uses of a definite class.

In the former case the servitude is styled positive or affirmative.

In the latter, negative.

The terms positive and negative are applied as affecting the person entitled to the servitude, *i.e.* a positive servitude gives him a right to do acts over a given subject, but a negative one merely gives him rights to forbearances on the part of the owner.

Example of a Positive Servitude.—A right of way.
Of Negative Servitude.—The *servitus altius non tollendi.*

2. No servitude can consist *in faciendo*, that is to say, in a right to an act or acts on the part of the owner or other occupant. This follows from the nature of servitus, it being *jus in rem* availing against the world generally.

The question arises, Can a negative servitude be *jus in rem*? It is classed as such, since it avails *adversus quemcunque possessorem*, and implies, equally with a positive servitude, a duty to forbear from disturbing, lying upon all persons equally.

LECTURE L.

3. Real and Personal Servitudes, the Nature of the Distinction.

A **real** servitude resides in a person as the owner or occupier for the time being of a given '*prædium*.'

A **personal** servitude resides in a given person without respect to the ownership or occupation of a '*prædium*.'

The distinction corresponds with that of the English law into easements *appurtenant* and *in gross*.

A real servitude resides in a person as the owner of a *prædium*, which is called the *prædium dominans*. The *prædium*, against whose owner the adverse right is exercised, is styled the *prædium serviens*. These rights of servitude are said to reside in the given things, and not in the persons holding them; hence we have such terms as *Servitutes rerum*.'

The expression Personal as here used simply means 'not *real*,' in the above sense.

A real servitude can hardly exist over a moveable, for to constitute one there must be a *prædium serviens* and a *prædium dominans*.

Real servitudes are in Roman law distinguished into *servitutes prædiorum urbanorum* or urban servitudes, the scope of which is the commodious enjoyment of a dwelling-house, to which it is annexed; and *servitutes rusticorum prædiorum*, the scope of which is the commodious cultivation of a parcel of land.

But this distinction lacks scientific preciseness.

The distinction which obtains in English law between rights *appendant* or *appurtenant* and *in gross* approaches to that above given as obtaining in the Roman law.

Examples.—A right of way appurtenant is a real servitude.
A right of way in gross is a personal servitude.

Digressions on servitudes :—

[1. The maxim 'Nulli res sua servit' imports that, as a servitude is a definite subtraction from the rights of user and exclusion, no man can have a servitude in a thing of which he is the owner.

2. Servitus means (α) the duty incumbent on any proprietor of the thing, and (β) the correlating duty.

3. A right of servitude may co-exist with any mode of property, for instance, ownership in common.

Absolute duties annexed to property (such as that of preventing a house in a town from getting into a ruinous state) are not servitudes.]

4. There are certain **modes of property styled Servitudes (improperly) in the Roman law.** These are: 1. *Usufructus*; 2. *Usus*; 3. *Habitatio*; 4. *Operæ servorum*. These seem to be rather modes of property (for the life of the owner) variously restricted in regard to powers of user.

In our own law we have the nearly similar modes of tenancy for life with and without impeachment of waste, tenancy by courtesy, tenancy in dower, &c.

[In the Roman law servitus appears strictly to have denoted one of the servitutes prædiorum, and was extended arbitrarily to usufructus and similar rights by analogy.

When the Roman jurists wished to refer these rights to a genus they included them in '**jura in re alienâ**.'

In the Institutes, ii. 23, apparently following Gaius, the term Servitus is limited to real servitudes. Usufructus, usus, and habitatio, are not deemed servitudes at all. So also in the French Code, usufruct, usage, and habitation are not counted as servitudes.]

LECTURES LI. AND LII.*

Distinction between *Dominium* and *Jura in re aliená* of the Roman Lawyers.

In order fully to explain the meaning of 'property' notice must be taken of the relation of the State to the private proprietor. We must notice that it is only in societies having systems of positive law that property as a *legal* right can be said to exist.

Inasmuch as the sovereign, though he cannot have any legal rights against his own subjects, has the power of dealing with all things within his territory at his own discretion, unrestrained by positive law, we may for the sake of convenience say that the sovereign is proprietor of all things within his territory.

Of the things which are the property of the State in the above sense some are reserved by the State to itself, others are granted for the use and enjoyment of private persons: the former class receive the name of *res publicæ*, the latter *res privatæ*.

Of *res publicæ* there are some which the State permits its subjects generally to deal with in certain limited modes, such, for instance, as public ways, rivers, and territorial seas. These are styled *res communes*.

Again, of *res publicæ* some are retained by the State in its own hands, others are conceded to public persons (individual or complex) as trustees for the community or some considerable section of it; this latter class receives the name of *res universitatis*, for these public persons were and are commonly corporate bodies, as, for example, governments of cities.

* The analysis follows Mr. Robert Campbell's arrangement in the student's edition.

[There is a class of things which partakes of the character of both public and private things, viz. property held by companies incorporated for public undertakings, who are allowed to levy tolls, &c., and to share the profits among the persons contributing the capital.]

Of *res publicæ* there is another class, viz. *res divini juris*. These are specially reserved by the State or granted in trust to public persons for certain uses.

In Roman law these things are distinguished from *res publicæ*.

Res privatæ are those which the State concedes to determinate private persons for their own advantage.

In respect of '*usus*' the right granted may be a mere *quasi*-servitude, or it may amount to any mode of property; and in this case the property may be burdened with a *quasi*-servitude in favour of the State.

[As the State cannot have legal rights, but only rights analogous to legal ones, we use the expression '**quasi-servitudes.**']

Example of a quasi-servitude reserved by the State would be a public right of way over a private farm; of a mere quasi-servitude granted by the State we may take as an example a right of way appertaining to a private farm over a farm in the patrimony of the State.

Various modes of Property.

A. In respect of the duration and period of enjoyment, which it is the purpose and scope of the right to confer, rights of property are susceptible of various modes.

[When we speak of a right we refer to the present. A future right is a contradiction in terms. But the purpose of the concession of rights by the State may regard the future, and, so far as it does so, a present right may be conferred to protect that future or expected enjoyment.

The purposes of the State in conceding the given rights may be gathered from observation, at any given epoch, of the purposes which the rights and duties enforceable by law are calculated to accomplish.]

The concession may be (α) for the enjoyment of one or more persons; (β) for a limited or unlimited time.

For instance, the concession may be to A for a term of years, provided he shall live so long, or to A for life, or to A and his heirs for ever.

[Heirs of A are persons capable of taking by way of descent from A, the word descent implying that there is physical basis of relationship.]

[In this last case the period contemplated by the concession is unlimited, *i.e.* no term can be assigned within which the subject will revert to the State. This, of course, is only one mode in which the State may confer a right with the intention of granting enjoyment of a thing for an unlimited period, but it is by far the most important.]

B. Again, modes of property may be determined by the intention of the State as to power of alienation, *i.e.* as to whether the right shall be alienable or not alienable.

By a right being alienable is meant, that the person immediately entitled under the concession shall have power to assign, convey, or dispose the aggregate of rights in the subject to another, and that the State will continue the concession in favour of such assignee.

This power of alienation may take different forms.

For example.—A concession to A and his heirs, with power of alienation to A.

And this power might enable A to alienate to B and his heirs, and the concession, according to the intention of the State, would be enjoyed by B and his heirs either during the existence of heirs to A, or in perpetuity during the existence of heirs to B.

Or again, the purpose of the concession may be that A may enjoy the concession for life, with power to alienate his life interest, and after his death to C and his heirs, so that C or his heirs shall have power to alienate, so as to pass an estate to his assignees and his heirs for ever.

This, in the language of the English law, would be described as 'a grant to A, remainder to C and his heirs.'

Substitution.

In Scotch law a grant to A and his heirs, and if A shall die intestate and without alienating, to B, would mean that A should have full power of alienation, but if he did not exercise it the estate shall go to B and his heirs. It would be expressed as a grant to A, *whom failing*, to B.

And such a destination would be called a substitution.

The phrase 'Spes successionis' is technically and conveniently limited to those expectations (such as that of B in the above case) which are defeasible in the way above mentioned (though it might be generally applied to the interest of every person having such a right to a *chance* of enjoying the concession).

In whatever terms the concession may be expressed, the State is the ultimus hæres, *i.e.* it must resume the thing upon the failure of the series of persons capable of taking under the concession; that is, upon the expiration of all the rights which merely subsist in the thing at the pleasure of the State, it naturally re-takes the thing into its own possession.

This applies both to moveable and immoveable property.

[In systems of law in which the division into real and personal, heritable and administrable, moveable and immoveable, is adopted, the intention to limit the estate of a series of persons is more readily presumed in heritable than in administrative property as being of a more permanent character.]

Absolute Property (*Jus in re propriâ*) defined.

It is a right imparting to the owner a power of indefinite user, capable of being transmitted to universal successors by way of descent, and imparting to the owner the power of disposition (from himself and his heirs per universitatem, and from all who have a *spes successionis* under any existing concession) in favour of such persons as he may choose, with the like powers and capacities as

he had himself, and under such conditions as the municipal law attaches to the dispositions of private persons.

Jura in re alienâ defined—

Jura in re alienâ are fractions or particles residing in one party of dominium, strictly so called, residing in another, and they may be either definite or indefinite subtractions from the owner's power of user and exclusion.

The *jura in re alienâ* generally considered in the Roman law are—

Servitus, emphyteusis, superficies, and the *jus in rem of the creditor* under a *pledge* or *hypothec*.

Servitudes considered as a species of jus in re alienâ.

Servitudes properly so called were esteemed *jura in re alienâ*, because they gave a right of definite user over a subject owned by another, or of subtracting a definite fraction from the owner's right of user and exclusion.

Servitudes improperly so called (*usufructus, usus*, and *habitatio*) were modes of property, or forms of property modified by regard to the rights of the person entitled to the enjoyment in expectancy, who in these cases was the dominus, whose right was commonly called *proprietas*, and not *dominium*.

Emphyteusis arose when land, the absolute property of some corporate body, such as a *municipium*, was let out to a person and his heirs (that is, for an unlimited duration) on condition of his cultivating it and paying a rent. It was jus in re alienâ on account of the reversion, or spes successionis, in the corporate body under the concession of the State, which the *emphyteuta* could not defeat.

Superficies.—By contract originally the owner might carve out of the subject of his ownership a *superficies*, and under this contract the lessee originally acquired only a jus in personam against the lessor, but the prætor allowed the lessee a quasi in rem actio against all except the person

who had a better title than the possessor of the solum himself, who could therefore evict both. Thus the *superficies* became in effect a jus in rem, and being conceived of as a fragment of the dominium residing in the proprietors of the *solum*, was a *jus in re alienâ*.

> [The person exercising the *jus in re alienâ* did not possess the *res*, but he had remedies analogous to those which the actual possessor of the *res* had for the protection of his possession. The possessor of the *jus in re alienâ* was, therefore, said to have quasi-possession of the right.]

The jus in rem of the creditor in a thing pledged or mortgaged.

The creditor has *jus in personam* in respect of the rights secured him by the pledge, and—

Jus in rem in the subject pledged, which may itself be a *jus in re alienâ*, as, for instance, a personal servitude granted out of the dominion of another.

By the Roman law the creditor could not acquire property in the subject of the pledge.

Tenure.

(1.) The idea of tenure originated from the practice, prevalent after the virtual dissolution of the Roman Empire, of conquerors giving conquered districts into the keeping of some chief who could command the obedience of the inhabitants. The latter in return would vow fidelity and allegiance.

(2.) The next stage in the history of the idea of tenure consists in the formulation in written documents of the indefinite relations above described.

The documents of the eighth and ninth centuries relating to this indefinite tenure are based on the precarium, or tenancy revocable (nominally) at the will of the grantor and *ceasing at the death of the grantee*.

(3.) About the end of the tenth century, by engrafting

upon the precarium the terms of the *emphyteusis*, the heirs of the grantee obtained the right of possession.

[In a charter of A.D. 1033, lands are conveyed '*habendum* **precaria** *atque* **enfiothecaria** *nomine*.']

(4.) The tenures so created by the great potentates were adopted by the smaller lords in their grants to their vassals, and the result was the elaboration of a system of feudal tenures.

Tenure and Tenancy of Land in England.

In England the statute of *Quia Emptores*, 18 Ed. I., put an end to the creation of new subordinate tenures; and the peculiar and inconvenient incidents of the old tenures were swept away by the Act 12 Car. II. cap. 24.

When lands therefore are held of a mesne lord, the tenant has a *jus in re alienâ*, as the lord has a reversion which the tenant cannot defeat.

The right of a tenant in an English lease for lives or years is a *jus in re alienâ* of the Roman lawyers, and is the historical consequent of *locatio conductio*.

The tenant, however, in an English lease acquired a *jus in rem*, as the English courts gave to the ousted lessee specific restitution to his *term* in the land, while the tenant under a contract of *locatio conductio* does not appear to have had any such right.

LECTURE LIII.

Complete and Inchoate, Vested and Contingent Rights.

The purpose intimated by the State at a given epoch in regard to the persons interested in the specially determined subject of concession may be to confer—

(*a.*) **Present enjoyment**, or—

(*b.*) **Future enjoyment.**

And this future enjoyment may be (*c*) to a person individually ascertained, or (*d*) to a person not so ascertained; and in this last case (*e*) there is either a certain person (or persons) in existence who will, on the happening of the given event, become determined to the then present enjoyment; or (*f*) there is no person in existence to whom the purpose of the State relates.

[*Examples of* (*c*) *and* (*d*).—Grant of real estate to A for life, remainder to B for life, remainder to C and his heirs. B and C are said to have vested remainders—B for life estate, and C for estate in fee.

Of (*c*).—Grant to A for life, remainder to B and his heirs if B shall attain twenty-one. If A's estate has come to an end when B attains twenty-one B takes possession; if it has not, B takes a vested remainder.]

[*Example of* (*f*).—To A for life, remainder to B for life, remainder to first and other sons of B in tail respectively (B having as yet no son).]

In all the above cases except (*a*) the interest of the individual to whom the future enjoyment is destined is only a *chance* of *future enjoyment*, though by most systems of positive law in case (*e*) a power of alienation and of transmission is annexed.

But in all cases the State, in order to carry out its purpose, lays some duties on the party in possession: and these duties, except in the case of (*f*), are relative duties, corresponding to the rights residing in the persons destined for the future enjoyment of the thing. In the case (*f*) there is no person whom those duties specially regard. The State enjoins the possessor to duties which are absolute, *i.e.* they do not regard any determinate person. The State is thus a trustee for the limited class of possible beneficiaries; to these beneficiaries the State, when they come into existence, will give a remedy against the contraveners of their estates.

The terms inchoate and complete as applied to rights.

When there is a person, or there are persons, in exist-

ence who will, on the happening of a specific event, be determined to the present enjoyment, such a person, on the happening of such specified event, will be determined to the present enjoyment. In the former case the right will be styled **inchoate**, in the latter, **complete**; the inchoate right so called being only the **possibility of a right.**

The interests arising under the concession of the State may be distinguished into two classes, as follows:—

'**Complete** *rights are those of persons in the actual enjoyment pursuant to the concession of the State; of persons having right to be immediately placed in such enjoyment; and of persons individually ascertained on whom, by the express terms of the concession, the State has unconditionally declared its intention of conferring the enjoyment at a future time.*'

'**Inchoate** *rights comprise all other rights under the concession, and may reside in persons having rights under the concession, or merely a spes successionis; or may be destined to persons of a certain description not yet in existence.*'

The above distinction is arbitrary. Every right must be constituted by one or more events or facts having happened. When one or more, but not all, these events have happened the right is inchoate; but the distinction, as drawn above, is important because it tallies with the distinction in modern systems between Vested Rights and a group of objects collectively styled Contingent Rights.

The notion conveyed by the word vested is entirely historical. Vesting originally meant the completing of the owner's right by actual possession, and the expression originated in the all-pervading feudal tenures.

By analogy the meaning has been extended to other rights than that of the owner seised in actual possession. Thus the fact which completes the predicament to which the law annexes a right is said to *vest* the right, and is styled the *investitive fact.*

The word *vested* is not applied to all rights, although the facts or events to which the law annexes the rights

have happened. The use of the term is, in fact, arbitrary, and differs greatly in various systems.

In any particular system, if we wish to examine the question of what constitutes **Vested Rights**, we should examine: 1. The juridical effects attached in that system to the circumstance of vesting; 2. the species of the facts, or the expression of intention which the law construes as creating a vested right.

Examples drawn from English law:—

Vested and Contingent Remainders.

The principal juridical effect of a vested as distinguished from a contingent remainder is that it is indefeasible, except by the expiration of the term assigned for its continuance.

The test of the species of events which constitute a vested remainder is given by Fearne as follows:—

'*The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent.*'

[*For example.*—Land given to A for life, remainder to B for life—B takes a vested remainder.

Land to A for life; and in case B survive A, to B and his heirs. B takes a contingent remainder; for if A in his lifetime left the possession vacant, there is no person who by the terms of the grant could fill it.]

'Vested' as applied to future interests other than remainders may be defined as equivalent to 'not subject to a condition precedent.'

Personal estate vested in the civil law was equivalent to unconditional or transmissible. In the civil law legacies payable at a future time certain to arrive were transmissible to the representatives of the legatee: to these the term vested is applied.

So contingent is the term applicable to conditional legacies payable on an event which might never happen; these were not transmissible to representatives.

[This division is not applicable to English law of legacies, which allows future contingent interests to be transmitted, and considers some kinds of conditional gifts as 'vested subject to be divested.']

[The term 'Vested Rights,' as it is applied in legislation, means simply that such rights are sacred and inviolable, and should be respected by the legislature. If it mean that in no case parties should yield to motives of expediency, the proposition is false and conflicts with universal practice; if it means that the legislature ought to deal cautiously and carefully with rights, and ought not to abolish them without a great preponderance of general utility, then the term 'vested' has an application different to that it receives in any system of positive law. For to disappoint expectations raised in accordance with the expressed purpose of the State were equally pernicious with violations of such expectations as amount to vested rights.]

LECTURE LIV.

Titles, or Investitive and Divestitive Facts.

Rights in rem considered with regard to their titles.

Titles are the facts or events of which the rights are the legal consequences, and also the facts or events on which by the dispositions of the law they terminate or are extinguished.

[(1.) **Rights are acquired immediately from the law,** when an enactment of the supreme legislature designates persons individually and by specific marks to their enjoyment present and future.

(2.) In all other cases persons are said to acquire rights by a title.]

[Titles will be considered (1) with regard to leading distinctions existing among them; and (2) the most important titles will be considered seriatim; viz.

1. Acquisition of *jus in rem* by **occupancy**, *i.e.* the occupation of a thing which has **no owner** with the purpose of acquiring it as one's own.

2. Acquisition of *jus in rem* by **labour**, *i.e.* by labour expended on a subject which has no previous owner, or on one which has (as by specificatio in Roman law).

3. The acquisition of *jus in rem* by **accession**, *i.e.* through the medium of a thing of which the party is part owner already.

4. The acquisition of *jus in rem* by **occupancy or** labour combined with accession.

5. The various modes of acquisition falling under the generic name of **title by ALIENATION**, or the intentional transfer of a right from one party to another.

6. The acquisition of jus in rem by **prescription.**

7. Such modes of losing rights as are not involved by implication in modes of acquiring them (as when absolute property terminates by the annihilation of the subject).]

LECTURE LV.

Titles.

Rights may be divided into two kinds:—

1. Those conferred by the law upon the persons invested with them through intervening facts, to which it annexes them as consequences.

2. Those conferred directly and not through the medium of any fact distinguishable from the law or command conferring the right.

The only rights of the latter class are personal privileges.

[*Privilegia rei*, or those granted to the occupants of a given prædium, are not privileges proper, being granted to the parties as answering to a generic description, who acquire by this title.]

The essence of a privilege properly so called is that it is an anomalous right conferred on a *specific* person as bearing the *specific* character peculiar to him.

Privileges may be conferred by the law which confers it directly or through a title. All rights that are not privileges proper can only arise through a *title*.

For whenever the law confers a right not on a specific person as such, it does so through the intervention of a title, since by the supposition the person entitled is not determined by the law through any mark specifically peculiar to himself.

Duties as well as rights may *arise from the law immediately*.

Where the duty is relative it arises from the very fact which engenders the corresponding right.

Consequently, if the right be a privilege, the relative duty as well as the right may arise from the law immediately.

In the case of absolute duties, when they are imposed on a specified person as such, they may be imposed by the law immediately.

In the same way, a duty as well as a right may terminate by a specific provision of the law exclusively applicable to the specific instance.

Functions of Titles.

In comparatively few cases rights and duties can be created and extinguished by the mere operation of law. Generally speaking, these results are obtained through

titles. Titles are necessary because the law, in conferring and imposing rights and duties, proceeds necessarily on general principles, and gives rights to persons as belonging to certain classes. And the facts which serve as titles, though they serve to mark the beginnings and endings of rights and duties, do not for that reason only take their creative and extinctive effects, but the given facts are chosen in preference to other facts (which might serve equally well as marks) from considerations of utility.

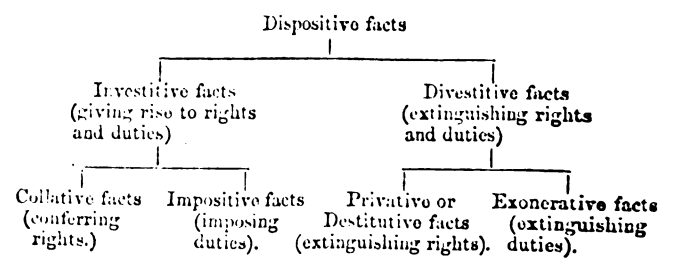
> [*Example.*—It would be indifferent whether, on a man's decease, his goods should pass to his remote or near relations, if one mark were as good as another. But for motives of utility the nearness of relationship is chosen as the mark to constitute title.]

Bentham objects that title is not applied to facts extinguishing rights.

Another objection is that title is not applicable to facts engendering or extinguishing relative or absolute duties. We do not speak of a title to a *burdensome duty*.

Bentham arranges the nomenclature thus—

All facts engendering or extinguishing rights or duties he styles dispositive facts, and he divides them as follows:—



> ['Title' in the Roman law is part of a complex mode of acquisition, and is only applied in certain cases in which rights are acquired by tradition and by prescription.

A title may often be separated into an antecedent and a consequent fact or set of facts; and titulus is the name given to the antecedent, and modus acquirendi to the consequent part. The French titre = the titulus of the Roman law.]

LECTURE LVI.

Titles distinguished into Simple and Complex.

These terms as applied to titles are merely relative. All titles are really **complex**, *i.e.* do not consist of one single and indivisible fact. A so-called **simple title** is one consisting of parts which, for the purpose contemplated by the speaker, it is not necessary to distinguish; while a **complex** title consists of parts which it is necessary to consider **separately**.

[*Example.*—Even title by occupancy (the least complex of all) consists of three distinct facts: (1) The negative fact of the subject having no previous owner; (2) the positive fact of taking possession; (3) the intention of the occupant.]

In some complex titles certain of the facts may be styled **principal** and others **accessory** (or again, the terms **essential** and **accidental** may be used of these two classes of facts).

There are generally reasons, founded on their nature, why rights or duties should be annexed to certain of the facts in a title rather than to others. These facts, which are styled **essential** or **principal**, are parts of the title, because they are absolutely necessary to the accomplishment of the purposes for which the right is annexed to the title by the lawgiver.

Accidental or accessory facts are constituent parts of the title, not because they are necessary to the accomplish-

ment of those purposes, but for some subsidiary or collateral reason.

For example.—These accessory facts may serve as evidence that the principal facts forming the title have happened.

> [*E.g.* when a deed is indispensable evidence of title and the writing is not admissible unless the deed is stamped. Here the stamp is an accidental part of the title annexed to secure the payment of a tax, and the nullity of the deed is the sanction of the law imposing the tax. This law might, however, be otherwise sanctioned, as by a fine.]

When a right or duty commences or is ended through a law without the intervention of a fact distinct from the law itself, it is said to do so ipso jure; or to arise or commence immediately from the law, ex lege immediatè.

But these expressions are improperly employed,

1. To indicate that neither the title nor any of the facts constituting the title is an act done by the person entitled.

> [*For example.*—In the case of necessary heirs in the Roman system, who are said to take the heritage ipso jure, or, in the language of our law, 'by mere operation of law,' *i.e.* without an act of their own.

2. To distinguish certain well-known titles.

Certain classes of titles have concise names (such as '*occupancy*,' '*alienation*,' &c.), and are opposed to classes which have not such names, as titles '*ex lege*,' &c.

But *every* right and duty must arise and be determined by law, and only those which arise or are divested without the intervention of a title can be said correctly to arise *ex lege immediatè*.

LECTURE LVII.

Classifications of Titles.

Various attempts at classifying titles have been made, but it is doubtful if any have been successful.

(1.) It is perhaps best to select the principal titles, and then add a miscellany '*ex lege*,' as above described. This is the plan followed by Ulpian, Bentham, Blackstone, and the compilers of the French Code.

(2.) The classification of Gaius and Justinian's Institutes is into *Titles ex jure gentium* and *ex jure civili*. But modes of acquisition *ex jure civili* generally consist of facts which are not of the essence of the right, but are merely accidental formalities prescribed by the law as necessary to the acquisition.

Again, titles are distinguished into—

(3.) Original and Derivative.

The former referring to the acquisition of rights directly from the State: the latter through a person in whom the right has resided.

Though confined by some to acquisitions *ex jure gentium*, and by others to acquisitions of *dominium*, it is just as applicable to *jus in personam* (*e.g.* assignee of a contract).

The distinction appears to be useless, except for the reason that in many cases of derivative titles the party is subject to duties passing from the party from whom the right is derived.

(4.) Titles by Descent and Titles by Purchase.

This is Blackstone's classification. It is a division of one class of rights only, rights in rebus singulis falling under the law of real (*i.e.* inheritable) property.

Modes of acquiring personal property are not divided in that manner, and the division is not complete even with reference to real property.

The full course of Lectures was never accomplished as originally contemplated by Mr. Austin. For the scheme of the whole series see Abstract of Outline, page xi.

TABLE I.

The Arrangement which seems to have been intended by the Roman Institutional Writers.

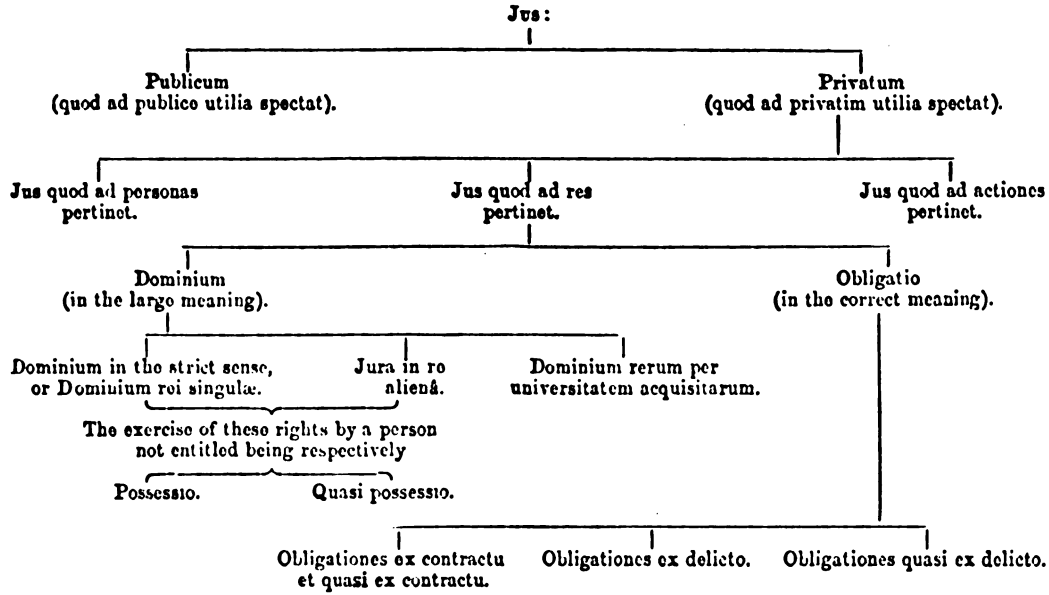


TABLE II.

The Arrangement intended by the Roman Institutional Writers, according to the views of the Civilians from 16th to 18th centuries.

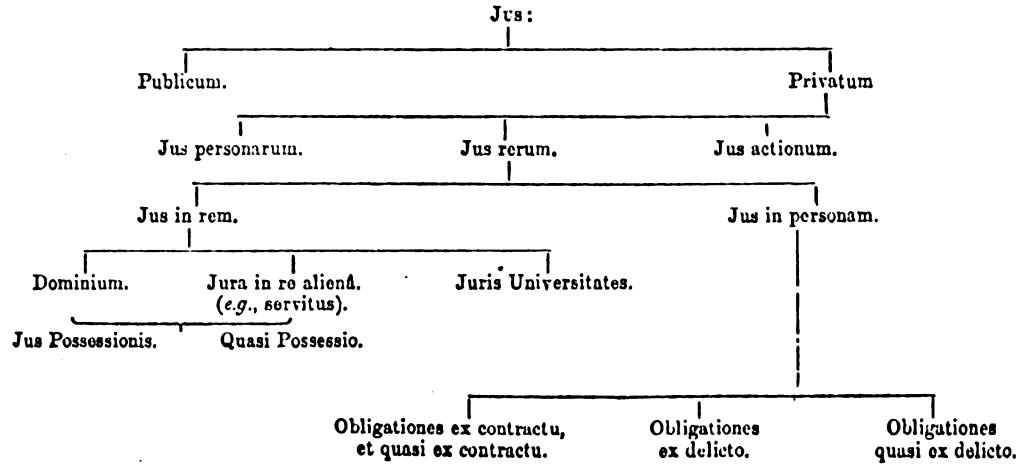


TABLE VIII.

The Arrangement which seems to have been intended by Blackstone.

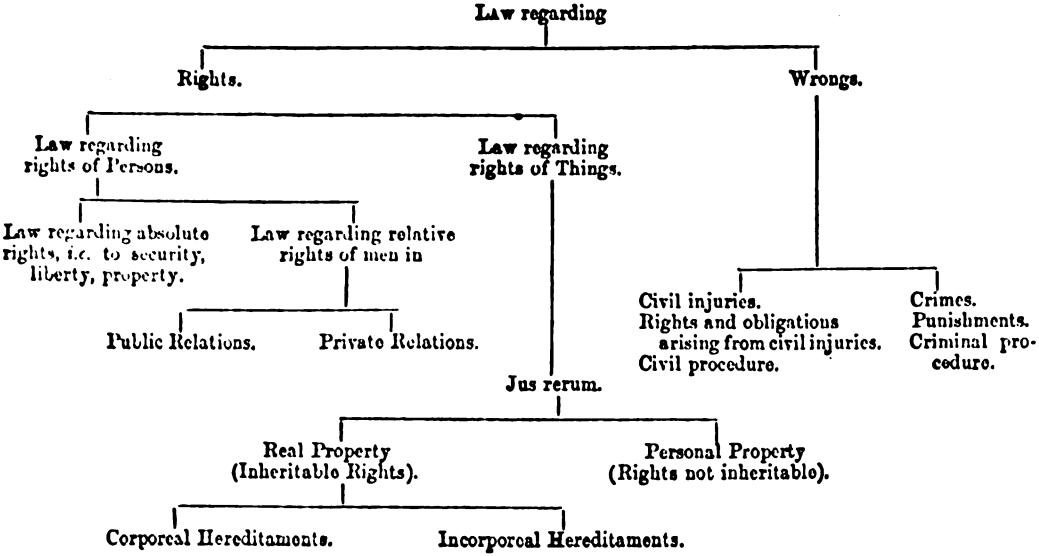
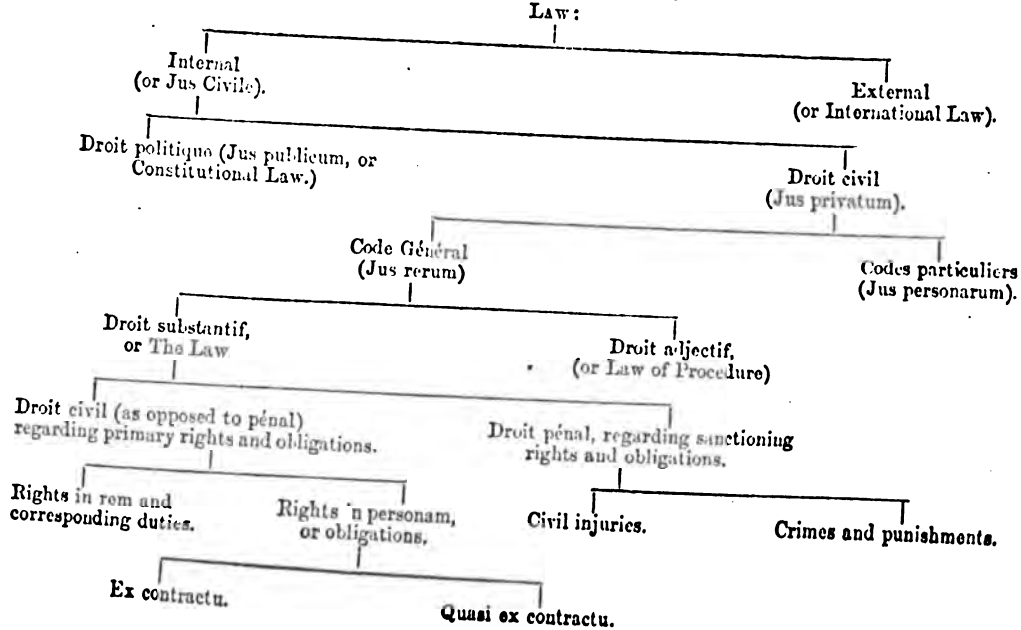


TABLE IX.

The Corpus Juris, as conceived by Bentham.



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